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EDITOR'S NOTE

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PROCEEDINGS AND ORDERS

DATE: 050186

CASE NBR 85-1-01150 CFX
SHORT TITLE Dennison Mfg. Co.
VERSUS Panduit Corp.

DOCKETED: Jan 6 1986

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Apr 7 1986	REDISTRIBUTED. April 18, 1986
Apr 21 1986	Petition GRANTED. Judgment VACATED and case REMANDED. Dissenting opinion by Justice Marshall. Opinion per curiam. *****

**PETITION
FOR WRIT OF
CERTIORARI**

No. 95-1150 (1)

IN THE

Supreme Court of the United States

Supreme Court, U.S.

FILED

JAN 6 1988

CLERK

DENNISON MANUFACTURING COMPANY,
Petitioner,

vs.

PANDUIT CORP.,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

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QUESTIONS PRESENTED

This petition presents the following questions:

1. Does not the decision of the Federal Circuit, in its failure to accept a critical fact finding of the lower court regarding the teachings of the prior art Emery patent, conflict directly with the pronouncements of this Court in *Anderson v. Bessemer City*, ___ U.S. ___, 84 L.Ed 2d 518 (1985), as to the proper role of a Court of Appeals in applying Rule 52(a), particularly where the lower court's fact finding was the better of only two permissible interpretations of that prior art, and where the finding was otherwise supported by competent oral, written and physical evidence?

In the resolution of this first question, the Court will be presented with this subsidiary question:

Does not the decision of the Federal Circuit, which involved a reinterpretation of the oral, written and physical evidence regarding the teachings of a prior art patent, constitute a misapplication of the "clearly erroneous" standard of Rule 52(a) which, as held by this court in *Anderson v. Bessemer City*, forecloses the appellate court from overturning a fact finding of the lower court simply because the appellate court's independent review of the evidence led it to make a different finding?

2. Were not the pronouncements of this Court in *Anderson v. Bessemer City* similarly ignored by the Federal Circuit in its refusal to accept fact findings regarding the differences between the subject matter patented and the prior art, particularly where the Federal Circuit indicates that such findings of the trial court were incorrect but then fails to provide any indication of what it considers to be the differences, and also fails to explain how its view of the differences can support patentability as required by this Court in *Graham v. John Deere Co.*, 383 U.S. 1, 17, 24 (1965)?

In the resolution of this second question, the court will be presented with this subsidiary question:

Does not the Federal Circuit, in the course of its *de novo* review of the question of obviousness under 35 U.S.C. § 103, violate the standards established by this Court in *Graham v. John Deere Co.*, by first refusing to accept the trial court's findings of fact regarding the differences between the subject matter claimed and the prior art, and by then reversing the trial court's conclusion of obviousness without stating what it perceives the differences to be?

3. Is not the decision of the Federal Circuit, in reversing the lower court's conclusion that certain patents are invalid for obviousness under 35 U.S.C. Section 103, in direct conflict with the decision of the Seventh Circuit in *All States Plastic Mfg. Co. v. Weckesser Company, Inc.*, 506 F.2d 465 (7th Cir. 1975), where:

i) both cases dealt with the question whether mounting of a cable tie pawl on an underlying ledge was a patentable concept; and,

ii) the Seventh Circuit concluded, contrary to the Federal Circuit, that the concept was unpatentable?

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RULE 28.1 STATEMENT

Petitioner Dennison Manufacturing Company has no parent companies or subsidiaries apart from wholly-owned subsidiaries or affiliates.

IN THE

Supreme Court of the United States

DENNISON MANUFACTURING COMPANY,

Petitioner,

vs.

PANDUIT CORP.,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit in its cause No. 85-1144. The judgment was entered on October 2, 1985. Rehearing was denied on November 20, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals has been reported at 774 F. 2d 1082 and is reprinted in the appendix to this petition

commencing at page 1a. The District Court opinion is not reported, but that decision, and the supplemental findings and conclusions forming a part thereof, are printed in the appendix to this petition, commencing at pages 43a and 57a, respectively.

JURISDICTION

The judgment of which review by this Court is sought was entered on October 2, 1985, and rehearing was denied on November 20, 1985. This Court has jurisdiction by virtue of 28 U.S.C., Section 1254(1).

THE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S. Constitution, Amendment V

"No person shall . . . be deprived of life, liberty or property, without due process of law"

35 U.S.C., Section 103

Conditions for Patentability; Non-obvious Subject Matter

"A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made"

Federal Rules of Civil Procedure

Rule 52(a)

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58;

and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

This proceeding was commenced in the United States District Court for the Northern District of Illinois, Eastern Division, on a complaint by Panduit Corp. ("Panduit"). The original complaint named Dennison Manufacturing Company ("Dennison") as the defendant, and prayed for judgment that Panduit's U.S. patents, Caveney No. 3,537,146 and Caveney, et al. No. 3,660,869 were infringed by Dennison's manufacture and sale of plastic cable ties. In an amended complaint, Panduit prayed for judgment that a third U.S. patent, Caveney, et al. No. 3,965,538, was also infringed by these cable ties.

Responding to the original and amended complaints, Dennison asserted that each of the patents was invalid and that its cable ties did not infringe the patents.

The plastic cable ties which are the subject of the three Panduit patents are much like common trouser belts in that they include a strap portion and an associated frame or head

portion designed for insertion of the strap.¹ (Drawings of the patented ties are included in the Federal Circuit's opinion, pages 4a and 5a of the appendix to this petition.) In use, the cable ties are tightened around a bundle of wires ("cables") to hold the wires in assembly. In typical applications, the cable ties are used by telephone companies when stringing wires in an office or the like, or under the hood of a car, so that multiple wires can be kept in neat assemblies.

The cable tie straps were designed with molded teeth, and the cable tie head portions were provided with pawls for engaging the teeth during insertion of the strap in the head. When the desired tightness around a bundle was achieved, the strap would be released but would be held in that desired position due to the engagement of the pawl with one or more strap teeth. The concept of pulling the strap in one direction past the pawl during insertion, and the ability of the pawl to resist return movement of the strap when the strap is released, is analogous to the standard ratchet and pawl operation found in many mechanical settings.

Panduit's variations from prior art plastic cable ties relate exclusively to the design of the pawl mounted in the head. In finding Panduit's '146 patent invalid, the trial court compared the patent claims with the prior art Emery patent, and found that the sole difference resided in the fact that Emery had only one pawl tooth acting to wedge the strap against an opposing wall surface of the head, while the '146 claims called for more than one such tooth. The trial court concluded that this difference would have been obvious at the time the invention was made, noting that other prior art taught the use of pawls with more than one engaging tooth.

In relying on the Emery patent, the trial court recognized an inconsistency in the drawings of the Emery patent. Thus, Figure 1 and the patent's written description make it clear that

¹ The terms "head" and "frame" are used interchangeably in the respective decisions and in this petition.

the normal position of the pawl is inside the head, and that the strap returns to this normal position after being tensioned. Figure 2, on the other hand, appears to show a pawl which is so long that it cannot fit inside the head.

The trial court found as a fact that Figure 1 of Emery correctly portrays the tie structure. The trial court stated (appendix 47a):

"Plaintiff points to Figure 2 of the Emery patent as evidence that Emery did not appreciate the desirability of wedging against the abutment wall. And Figure 2 does, indeed, show a substantial portion of the pawl and the engaged strap to be sticking out of the head and obviously not in contact with the abutting wall.

On the other hand, the text of the Emery patent makes abundantly clear that Emery's intention was to achieve wedging against the abutment wall. That can only be accomplished if the wedging is inside the head, because that is where the abutting wall is, inside the head.

Now, how do we account for the drawing? I can't account for that drawing any more than I can account for the Moody drawing. It's an aberration, it's an anomaly. And as I indicated a little earlier this afternoon, it is difficult to believe that someone whose only task was to make two drawings, could make a mistake on one of them when his business is making patent drawings. And yet, I adopt defendant's suggestion that what is represented by Figure 2 of Emery is a draftsman's error.

You can't read that patent with any knowledge whatever of the art involved and conclude that the lion's share of the engagement of the strap and the pawl is supposed to take place outside the head.

I conclude, therefore, that Emery is specific prior art for wedging the strap between the pawl and the abutment wall inside the head, and doing it in a secure manner so that the strap won't come loose."

The Federal Circuit refused to accept this finding which was critical to the trial court's conclusion that the '146 patent was invalid. It said (appendix 7a):

"Emery's drawing shows the pawl outside the frame and pressing the strap against the upper edge of the frame. Emery's sole independent claim says the pawl is 'displaceable from within said frame' and returns 'into said frame upon removal of said tongue end from said frame. Though the text says the pawl is 'adapted to return to said normal position upon movement of said tongue portion in the reverse direction', the drawing, the claim, and the specification as a whole indicate that Emery's pawl returns *toward* its normal position upon reverse movement of the strap (tongue), but does not enter the frame until the strap is removed. The drawing referred to by the district court is the only drawing (of two) that shows the strap in use, and the representation of the pawl outside the head is a major segment of the drawing, emphasized by cross-hatching. No basis exists in the record for assuming that the inventor, the patent attorney, the draftsman, and the examiner would all have failed to notice the glaring aberration seen by the district court, if aberration there were." (Emphasis in original.)

The suggestion by the Federal Circuit that "no basis exists in the record" for the trial court's finding is simply not correct. This is established most dramatically by the following comments of *Panduit's* counsel at trial:

"MR. PIGOTT: If I just may very briefly respond directly to the question your Honor left with me at the end of the day yesterday, I would say as to Emery that *it is possible that the Emery specification would suggest* to someone of ordinary skill that you would want to grip the strap against that opposite wall of the frame in Emery.

But I further submit a much *more reasonable* and fair interpretation is that the specification would teach one to grip the strap against that inside corner at the top of that end wall, which is much more consistent with the drawing. (Emphasis supplied.)

The issue at trial was, therefore, *not whether* there were different permissible views of the Emery teachings; the issue was, instead, whether Panduit's view was "more reasonable" than Dennison's view. The trial court found against Panduit on

that point, but the Federal Circuit disagreed, choosing to adopt the view that *it* felt was the better one.

In failing to accept the trial court's interpretation of Emery, the Federal Circuit ignored clear evidence supporting the correctness of the trial court's finding. Thus, in developing its own interpretation of this document, the Federal Circuit discounted one statement in the patent supporting the trial court's interpretation, and then declined to recognize the existence of other such passages. Furthermore, the Federal Circuit does not refer at all to expert testimony dealing with the Emery patent which supports the trial court's finding. And perhaps of greatest significance is the fact that the trial court had before it—although not mentioned in its oral opinion—drawings of the commercial Emery cable ties and samples of the commercial ties. The deposition of the U.S. distributor of these ties confirms that the trial court's interpretation of the Emery patent was correct, but the Federal Circuit opinion simply fails to acknowledge the existence of this other evidence.

The interpretation of Emery was, moreover, critical to the determination whether Panduit's '146 patent was valid or invalid. Thus, the trial court found that Emery's pawl wedged the cable tie strap against an opposing wall of the head, and with that teaching in the prior art, it is apparent that there is no invention claimed in the '146 patent. On the other hand, the Federal Circuit found that the pawl did not wedge the strap against the head wall, and this was the basis for its reversal of the trial court.

With respect to Panduit's '869 and '538 patents, the trial court found that they differed from the prior art only by calling for a ledge supporting the pawl within the head. In the case of the '538 patent, the pawl was hinged to the ledge, while the '869 patent has the pawl supported directly on the ledge.

The prior art, as best represented by the Orban patent (a patent owned by the U.S. distributor of the Emery cable ties), hinged the pawl to a side wall rather than to an underlying ledge. The trial court, particularly in view of the then-known need for increased performance in cable ties, concluded that

one skilled in the art would naturally be led to support the pawl on an underlying ledge or platform, even without any teaching of that concept in the prior art. But the trial court then also found that there were prior art disclosures suggesting the use of ledge support for a pawl, including one reference, Litwin, that disclosed a hinge connecting the pawl to the underlying support.

The trial court stated (appendix 50a):

"The Japanese patent and the Litwin patent, which are prior art to the '869 patent, also showed structures analogous to the '869 ledge in that they absorbed compressive force, force exerted by the strap as it was tightened about the bundle.

As in the case of the introduction of an additional tooth or additional teeth in the '146 patent, the result achieved by introducing a ledge in the '869 patent was altogether expected.

* * * * *

It seems to me, and I so find, that to increase the comprehensive strength of the cable ties, and specifically the pawl and hinge of the cable tie, you would set the pawl on a ledge."

With respect to the '538 patent, the trial court found (appendix 51a):

"And that is the essence of the '538 patent, the discrete hinge.

A hinge is an elementary method of making something bend."

* * * * *

"Now, there are numerous examples in the prior art of hinges and discrete hinges of the kind claimed in the '538 patent. The web in Emery is one example. Litwin has a hinge. Fein, if hinging is a matter of degree, has a hinge, and I refer to Column 2, Line 37 of Fein.

* * * * *

"I find each element and the combination of elements in the '538 patent to have been obvious to a person or

ordinary skill in the art at the time of the claimed inventions."

When it is considered that the trial court also determined (appendix 44a, in a finding not disturbed by the Federal Circuit) that the level of skill in this art was that of a graduate engineer with a high degree of familiarity with plastics and plastic molding, it is not surprising that the '538 and '869 patents were found to be invalid for obviousness.

The Federal Circuit in its discussion on "Obviousness", beginning at appendix 14a, does not deal with the fact that Orban, in particular, discloses *every* feature of the representative claims of the '869 and '538 patents except for the ledge and associated hinge. Thus, the Federal Circuit did not focus on the differences between the prior art and the claimed subject matter, and then discuss obviousness in that light, as the trial court did, and as required by this Court in *Graham v. John Deere Co.*, 383 U.S. at 17, 21.

The Federal Circuit indicates (appendix 19a) that "the 'ledge' and 'hinge' were not naked in the claims, but were set forth with particular characteristics and relationships to other elements" Underlying the Federal Circuit's decision, therefore, was its refusal to accept the trial court's findings of fact that these "ledge" and "hinge" features were, indeed, the only differences. That error by the Federal Circuit was then compounded by the fact that it reversed the trial court without ever explaining how the differences, as it viewed them, were sufficient to support patentability, a step fundamental to resolution of the obviousness question.

REASONS FOR GRANTING OF THE WRIT

The Court should issue the writ of certiorari in this case because the Federal Circuit's reversal of the trial court is grounded upon a total disregard of the requirements of Rule 52(a), while also involving a clear conflict between the Federal Circuit and the Seventh Circuit regarding the application of 35 U.S.C., Section 103.

The Federal Circuit's decision does not refer either to Rule 52(a) or to this Court's ruling in *Anderson v. Bessemer City*. Thus, in overturning the trial court's fact finding regarding the Emery patent, appendix 7a, there is no recognition by the Federal Circuit of its obligation to accept fact findings based on competent evidence.

In similar fashion, the trial court's fact findings regarding the differences between the '869 and '538 claims and the prior art were simply given no weight by the appeals court. Indeed, the Federal Circuit in this instance did not bother to make any contrary finding of its own; instead the court reversed the trial court on the question of obviousness without even discussing the requirement of *Graham v. John Deere Co.*, *supra*, 383 U.S. 17, that fact findings regarding such differences must be made before the question of obviousness can be resolved.

The Federal Circuit's decision also fails to explain how it can be reconciled with the decision of the Seventh Circuit in *All States Plastic Mfg. Co. v. Weckesser Company, Inc.*, *supra*, 506 F.2d 465. As Panduit did here, the patent owner in *All States* urged that the mounting of a cable tie pawl on a ledge was a novel feature. The Seventh Circuit, correctly applying the test established by this Court in *Graham*, considered that difference and found that it would have been obvious to a skilled worker to use such a ledge in a cable tie. The Seventh Circuit stated, at 506 F.2d 466:

"The essential inventive element claimed by the Eberhardt patent is the configuration of the pawl, which is described as 'essentially rhombohedral' in configuration, and the disposition of the pawl on a ledge within the opening which extends fully from one side of the opening to the other."

* * * * *

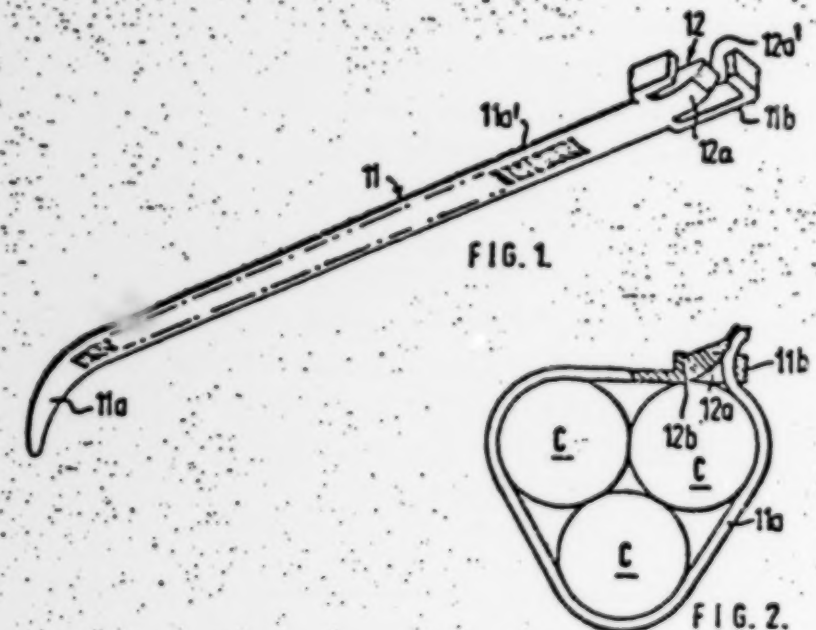
"The district court held that the structure disclosed in the Eberhardt patent was obvious in light of relevant prior art, some of which was not considered by the patent examiner in granting the patent. We affirm the finding of invalidity on this ground." (Emphasis supplied.)

The trial court's reasoning in this case followed faithfully the reasoning of the Seventh Circuit. The Federal Circuit, on the other hand, in concluding that the '869 and '538 patents were valid, simply side-stepped the elementary tests of *Graham* applied by the Seventh Circuit and the trial court.

We submit that the outright failure of the Federal Circuit to abide by the provisions of Rule 52(a) in this case, and its consequent disregard of the tests set forth in *Graham*, call for review by this Court, not only to prevent manifest injustice to Dennison, but also to avoid similar future errors. In support of this plea, we make the following points:

I. THE TRIAL COURT'S CRITICAL FACT FINDING REGARDING THE PRIOR ART EMERY PATENT WAS BASED ON COMPETENT EVIDENCE AND THE FEDERAL CIRCUIT SHOULD NOT HAVE DISTURBED THAT FINDING.

The Emery cable tie is depicted in two drawing figures as follows:



In Figure 1, the pawl is shown within the head and, as discussed in the text of the patent, the pawl is displaced from this normal position within the head during strap (tongue) insertion and is then "... adapted to return to said normal position upon movement of said tongue portion in the reverse direction and thereupon to abut and grip said tongue portion ...".

Figure 2 conflicts with Figure 1 because in Figure 2, the pawl appears to be so long that it could never be positioned within the head, with or without the strap being in place. Accordingly, the Figure 2 showing does not allow for the "return to said normal position" which Emery calls for in his written description.

It became necessary for the trial court to resolve this obvious inconsistency in the Emery disclosure because the Figure 1 form of Emery embodies the concept claimed in the '146 patent while the Figure 2 showing does not. Specifically, as shown in the drawing of the '146 patent set forth in the Federal Circuit opinion (appendix 4a), the cable tie strap, after insertion, is held between the pawl and the opposing head wall. It was critical for the trial court to determine whether Emery taught this same relationship of the pawl, strap and head wall when his strap is inserted in the head.

There was considerable competent evidence to support the trial court's finding that Emery did teach the same relationship as claimed in the '146 patent. Thus, in addition to the foregoing discussion in the Emery text regarding the manner in which his tie operates, Emery disclosed the use of "serrations" on the head wall opposing the pawl. Such "serrations" are *only* of value if the strap is wedged against that wall by the pawl, that is, when the pawl is in the *Figure 1* position with the strap in place.

Joseph Paradis, a plastic molding expert having many years of experience reading and interpreting patent disclosures, testified that the Figure 1 illustration, when considering the balance of the Emery disclosure, was the correct illustration.

And this led him to conclude that this relationship taught by Emery was the same relationship as that claimed in the '146 patent.

Also of singular importance is the fact that the trial court had before it testimony from the producer of the Emery cable ties, along with drawings and samples of the commercial ties. This evidence established that the commercial Emery ties had the Figure 1 configuration, thereby providing, at the very least, strong corroboration that the trial court made the correct finding.

It is apparent that when the Federal Circuit chose to reinterpret Emery and to make its own finding of fact regarding the nature of that disclosure, it acted directly contrary to Rule 52(a), and gave no deference at all to this Court's holding in *Anderson v. Bessemer City*. As in that case, (and as confirmed at trial by Panduit's own counsel, *supra*, page 6), there were two permissible views; the trial court took one view of Emery while the Federal Circuit took the other. This Court's ruling in *Anderson*, at 84 L.Ed 2d 528, establishes that the Federal Circuit exceeded its authority in so doing:

"Where there are two permissible views of the evidence, the factfinder's choice between them *cannot* be clearly erroneous." (Emphasis supplied.)

It is undeniable that the contrary fact finding of the Federal Circuit was critical to the reversal of the trial court's conclusion that the '146 patent was invalid. Thus, the *only* difference between the claimed combination of the '146 patent and Emery (Figure 1) is the claim requirement for more than one tooth positioned parallel to the opposing frame wall. But, as the Federal Circuit noted, appendix 19 a, the presence of extra teeth did not form the basis for allowance of the patent claims.² Resolution of the conflict between Figures 1 and 2 of Emery, therefore, completely settles the validity question.

² The Federal Circuit errs here in stating that the Examiner "cited the two references pointed to by the district court as disclosing multiple teeth." In fact, the Examiner did not cite either Fein or Litwin during prosecution of the '146 application.

II. THE FEDERAL CIRCUIT'S REFUSAL TO ACCEPT CRITICAL FACT FINDINGS ALSO SERVED AS THE BASIS FOR ITS REVERSAL OF THE TRIAL COURT'S HOLDING THAT THE '869 AND '538 PATENTS ARE INVALID UNDER 35 U.S.C., SECTION 103.

Critical to the decision of the trial court that the '869 and '538 patents are invalid for obviousness were its findings regarding the differences between the prior art and the claimed subject matter of these patents. Thus, the trial court first focused on these differences with respect to each patent, and then gave the reasons for its conclusions of invalidity.

As can be observed, again by reference to the drawings included in the opinion of the Federal Circuit (appendix 4a and 5a), each patent involved the provision of a pawl mounted on a ledge, with the '538 patent structure differing by reason of a hinge interposed between the pawl and the ledge.³

A. The '869 Patent

Considering, for example, the Orban patent, it is apparent

³ The reference in the '538 drawing to a "noncollapsible" hinge is incorrect and results from an unfortunate error by the Federal Circuit which was responsible, at least in part, for the completely unwarranted criticism of Dennison's counsel which pervades that court's decision. The Federal Circuit concluded (appendix 36a) that the collapsible hinge was a "different embodiment" of Panduit's invention, but during prosecution of the '538 patent application, Panduit filed affidavits and arguments advising the patent examiner that the collapsible hinge constituted "... a further inherent property of the cable tie *originally disclosed and claimed*." (Emphasis supplied.) Panduit argued in its brief before the Federal Circuit that a "different embodiment" of its cable ties had the collapsible hinge and the Federal Circuit not only accepted that erroneous statement but then compounded its error by publicly indicting Dennison's counsel for correcting Panduit.

that the trial court accurately recognized, in the case of the '869 patent, that the only difference claimed by Panduit resides in the presence of the ledge.⁴ Thus, Orban, as did his predecessor, Emery, attached the pawl to the side of the frame wall rather than placing the pawl on a ledge extending underneath the pawl.

The trial court concluded that the use of the ledge was an expedient that would have been obvious to the skilled worker at the pertinent time. The trial court observed (appendix 50a):

"A contemporaneous development was the Eberhardt patent, which referred to a ledge being provided so as to constitute a rigid base. The Japanese patent and the Litwin patent, which are prior art to the '869 patent, also showed structures analogous to the '869 ledge in that they absorbed compressive force, force exerted by the strap as it was tightened about the bundle.

As in the case of the introduction of an additional tooth or additional teeth in the '146 patent, the result achieved by introducing a ledge in the '869 patent was altogether expected.

* * * * *

It seems to me, and I so find, that to increase the compressive strength of the cable tie, and specifically the pawl and hinge of the cable tie, you would set the pawl on a ledge.

⁴ It must, of course, be conceded that the trial court, when rendering its oral opinion, did not go through the exercise of comparing each limitation of the '869 and '538 patent claims with Orban or any other reference. But it is certainly correct, and implicit in the trial court's opinion, that the prior art ties do embody *every* element claimed except for the ledges and hinge. Thus, prior art ties such as Orban have straps with teeth, frames or heads with surrounding walls, and pawls mounted in the heads. The trial court correctly focused on the differences, as *Graham* required it to do.

The trial court's recognition of ledges in the Japanese patent and Litwin and in the patent of the contemporaneous worker, Eberhardt (appendix 50a), constitutes a finding of fact that it would have been obvious at the pertinent time for the skilled worker to use a ledge in a cable tie such as Orban. Since Orban meets every other limitation of the '869 claim, it is apparent that the trial court was correct when concluding that the claim was invalid under Section 103.

This conclusion was fortified by the testimony of the inventor Caveney regarding the specifications that cable tie designers were faced with at the time. Thus, it had been determined that greater "pull out" strength—that is, greater resistance of the pawl to ripping away from the head when the strap was tensioned—would be required in cable ties. Caveney designed the '869 tie with that knowledge in mind, and to achieve that strength, Caveney mounted the pawl on a platform or ledge, thus adopting one of the two options which the prior art provided. It is completely understandable why the trial court did not consider Caveney's effort an invention; he only did what a skilled worker would find it obvious to do when faced with an increased strength requirement.

As noted, the Federal Circuit does not state how, in its view, the '869 claims differ from the prior art and, accordingly, it does not specifically discuss why it concludes that it was invention to use a ledge in an otherwise old cable tie. But implicit in the Federal Circuit's reversal is its refusal to accept the finding made by the trial court that the "ledge" of the '869 patent is the only difference claimed by Panduit. The lengthy comments of the Federal Circuit, while never becoming specific, suggest (for example at appendix 19a) that there are other differences, but that is simply not the case.

It thus becomes clear that while the trial court correctly applied the applicable *Graham* test, the Federal Circuit did not. Instead of accepting the trial court's fact finding regarding the sole difference between the '869 claims and the prior art, and

then determining whether there was reversible error in the trial court's conclusion that the claim was invalid under Section 103, the Federal Circuit reversed without ever specifically dealing with "The Obviousness of the Differences" (*Graham*, 383 U.S. at 24.) Indeed, the Federal Circuit actually criticizes the trial court for focusing on that difference, a criticism which, in effect, criticizes the *Graham* test established by this Court.

B. The '538 Patent.

The Federal Circuit's treatment of the '538 claim followed the same erroneous path. Here, the trial court found that the difference between the claim and the prior art resided in the fact that the pawl was mounted on a ledge with a hinge interposed between the pawl and ledge. In making its determination that the '538 patent was invalid, the trial court considered whether a prior art cable tie including that difference would have been obvious at the pertinent time to a worker of ordinary skill.⁵ The trial court undertook this task in light of Caveney's testimony that designers at that time were aware of a

⁵ The Federal Circuit's opinion states (appendix 11a) that the trial court treated the '869 patent as prior art when dealing with the '538 patent. This was another unfortunate departure from the record by the Federal Circuit since explicit contrary statements were made by the trial court. The record shows that the trial court heard oral argument following the close of the evidence, and then immediately rendered its oral opinion. This extemporaneous procedure of the trial court may, perhaps, have led to the inclusion of statements which would not appear in an edited opinion written after a review of post-trial memoranda and of suggested findings and conclusions. But the trial court invited supplemental findings and conclusions after rendering its opinion (appendix 56a), and in the course of adopting these findings, the trial court expressly identified the prior art applicable to the '538 patent (appendix 59a, 61a.) The trial court's practice does not warrant, we believe, the Federal Circuit's refusal to even acknowledge that supplemental fact findings were made, let alone to suggest that the trial court made misstatements of fact when adopting these supplemental findings. We submit that the Federal Circuit must treat the trial court's supplemental findings as part of the record.

"rigidity" problem; they knew that cable tie pawls had to be flexibly mounted. (Appendix 51a.)

The trial court's conclusion was also based on the fact that one of ordinary skill would be aware of the function of a hinge, and the conclusion was fortified by explicit findings regarding the teachings of the prior art. The use of a hinge for providing pawl flexibility in the prior art Litwin patent, for example, served as a sound basis for the trial court's conclusion that the '538 claim did not recite an invention.

In the course of reversing the trial court's conclusion, the Federal Circuit (appendix 11a), expressly refused to adopt the trial court's finding that three claim limitations in the '538 claim are really one, that is, that the claim uses many words but that when the words are analyzed, they describe only a hinge. But, the Federal Circuit does not make any explicit contrary finding of fact regarding the import of the '538 claim limitations, stating only that "... the limitations give *meaning* to the various elements of the claims in suit." (emphasis in original; quote incorporated by reference into footnote 10 at appendix 11a). Implicit in these comments is the suggestion that the Federal Circuit is making a contrary finding, that is, that it does see something other than a hinge on a ledge which distinguishes the '538 claim from prior art cable ties such as Orban. But the Federal Circuit never states what its findings are regarding the differences and, as necessarily follows, it never discusses its view of the differences in the *Graham* context.

The Federal Circuit's implicit contrary fact findings had to have been the basis for its conclusion that the trial court committed reversible error with respect to the '538 patent. It is ironic that, in the process of reaching that conclusion, the Federal Circuit again criticizes the trial court (and Dennison's counsel) for focusing on the differences between the patent claim and the prior art. Thus, the trial court is again criticized for following the course plotted in *Graham* which requires the trial court to determine such differences, and to then consider the issue of patentability with that fact finding in mind.

We submit that the error lies with the Federal Circuit, not with the trial court, since the Federal Circuit ignored the trial court's finding regarding the differences, but never explained why it believed the facts in this case distinguish from the facts in *Graham* where this Court, at 383 U.S. 26, noted that the patent there at issue "... presents no operative mechanical distinctions, much less nonobvious differences."

III. THE FEDERAL CIRCUIT'S ERRONEOUS VIEW OF CONTEMPORANEOUS DEVELOPMENTS MAY HAVE CLOUDED ITS REASONING AS TO PATENTABILITY OF THE CLAIMED INVENTIONS.

The Federal Circuit was of the view (appendix 17a):

"... there is no way that one skilled in the art in 1961 and 1968 (necessarily unaided by knowledge of the patents in suit and Caveney's testimony) would find in the prior art either a teaching or a suggestion of the claimed inventions."

This view ignores totally the fact that two contemporaneous workers, independently of Panduit and of each other, followed the same course delineated by Panduit's patent claims. Specifically, the patentees Eberhardt and Bourne, operating without any knowledge of Panduit's efforts, designed cable ties and filed patent applications at essentially the same time as Panduit, and these cable ties were both characterized by:

a) pawls which wedged the strap against an opposing wall; and,

b) pawls mounted on an underlying ledge.⁶

⁶ The Bourne and Eberhardt filing dates substantially coincided with the '146 filing date (all filed in a three-day period), and the '869 and '538 filing dates were several months *later*. The Federal Circuit was incorrect when stating (appendix 9a and 10a, respectively), that the Eberhardt and Bourne applications were filed "... three months after ..." the '869 and '538 applications.

(The Bourne tie also interposed a "flexible neck" between the pawl and ledge, and the trial court found as a fact that this was a "discrete hinge".) (Appendix 52a.)

It is apparent that Panduit, Eberhardt and Bourne all responded at about the same time to the new specifications facing the industry. Thus, as Panduit's inventor Caveney conceded, there was a need to strengthen the ties and to, at the same time, provide flexibility. Panduit, Eberhardt and Bourne all selected an option already suggested by the prior art, namely, the mounting of the cable tie pawl on a ledge. Both Panduit and Bourne adopted another prior art suggestion by connecting the pawl with a hinge for achieving flexibility. *Otherwise*, the respective cable ties were like all others, that is, they all had straps and pawls with interengaging teeth associated with an integrally molded frame.

The Seventh Circuit, in *All States v. Weckesser, supra*, recognized, at 506 F.2d 466, that Eberhardt's contribution of a ledge-mounted pawl was not an invention. That court, interestingly, also commented that Bourne "... is quite the same as the suit patent [Eberhardt] configuration with the addition of the three extra locking teeth."

The Federal Circuit's refusal to accept the trial court's findings regarding these contemporaneous developments, coupled with its clear mistake regarding the filing dates, certainly contributed to its conclusion that the trial court committed reversible error when deciding that the Panduit patents were invalid.

CONCLUSION

In the course of criticizing the trial court for focusing on the elements which distinguish Panduit's claims from the prior art, the Federal Circuit castigates Dennison for arguing that upholding of Panduit's patents would be tantamount to telling the cable tie industry that Panduit had monopolized the use of such elements.

Those arguments were made by Dennison in the context of this Court's holding in *Anderson's-Black Rock v. Pavement Co.*, 396 U.S. 57, 61 (1969), to wit:

"... Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to material already available."

That reasoning is obviously applicable here. Panduit's patent claims distinguish from the prior art in only the most pedestrian respects (extra teeth, a ledge and a hinge, respectively), but Dennison faces an injunction and potentially heavy damages if it is ultimately excluded from using such elementary features in its cable ties.

The decision of the Federal Circuit would impose a manifest injustice upon Dennison, and Dennison accordingly prays, most urgently, that the writ of certiorari be issued.

Respectfully submitted,

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APPENDIX

PANDUIT CORPORATION, Appellant,

v.

DENNISON MANUFACTURING CO., Appellee.

Appeal No. 85-1144.

United States Court of Appeals, Federal Circuit.

Oct. 2, 1985.

In patent infringement suit, the United States District Court for the Northern District of Illinois, Grady, J., held invalid various claims of the patents in question, relating to one-piece cable ties, and appeal was taken. The Court of Appeals for the Federal Circuit, Markey, Chief Judge, held that: (1) the claims in question were not invalid for obviousness; (2) there was no double patenting; and (3) the first of the patents at issue was not anticipated.

Reversed as to validity, and remanded.

* * *

Charles F. Pigott, Jr., Pigott, Gerstman & Gilhooly, Ltd., Chicago, Ill., argued for appellant.

Charles R. Wentzel, Panduit Corp., Tinley Park, Ill., of counsel.

James P. Ryther, McDougall, Hersh & Scott, Chicago, Ill., argued for appellee. With him on brief were Thomas C. Elliott, Jr., McDougall, Hersh & Scott, Chicago, Ill., and Thomas F. Curry, Dennison Mfg. Co., Waltham, Mass., of counsel.

Before MARKEY, Chief Judge, COWEN, Senior Circuit Judge, and NEWMAN, Circuit Judge.

MARKEY, Chief Judge.

Appeal from a judgment of the United States District Court for the Northern District of Illinois, Eastern Division, holding claims 1-4, 7, 10, 12, 14-22 and 24-27 of United States

Patent No. 3,537,146 ('146 patent), claims 1, 10 and 12 of United States Patent No. 3,660,869 ('869 patent), and claims 1, 2, 5, 6, 11, 17, and 21 of United States Patent No. 3,965,538 ('538 patent) invalid on the ground of obviousness, and the same claims of the '538 patent invalid on the ground of double patenting. We reverse.

Background

(1) The Art

One-piece cable ties are used to bind a bundle of cables or insulated wires. Looped around the bundle, a strap has one end passed through an opening in a frame at the other end. Teeth on the strap engage with a locking device at the frame. The strap and device operate to permit tensioning of the strap end to prevent its loosening or withdrawal.

Prior art cable ties with rigid locking devices had a desired high strap withdrawal force, but an undesired high strap insertion force. Conversely, those with flexible locking devices had an undesired low withdrawal force and a desired low insertion force.

(2) The Real World Story

As stated in *Rosemount, Inc. v. Beckman Instruments, Inc.*, 727 F.2d 1540, 1544, 221 USPQ 1, 5 (Fed.Cir.1984), many patent suits "arise out of the affairs of people, real people facing real problems." That is true of the present suit.

Jack E. Caveney founded Panduit in the basement of his home in 1955, making first a plastic wiring duct. In 1958, he developed and began selling a two-piece plastic cable tie. In 1961, he began a research program to develop a one-piece plastic cable tie. That program lasted nine years and cost several million dollars. The end result of that program is the tie of the '538 patent, which includes the features of all three

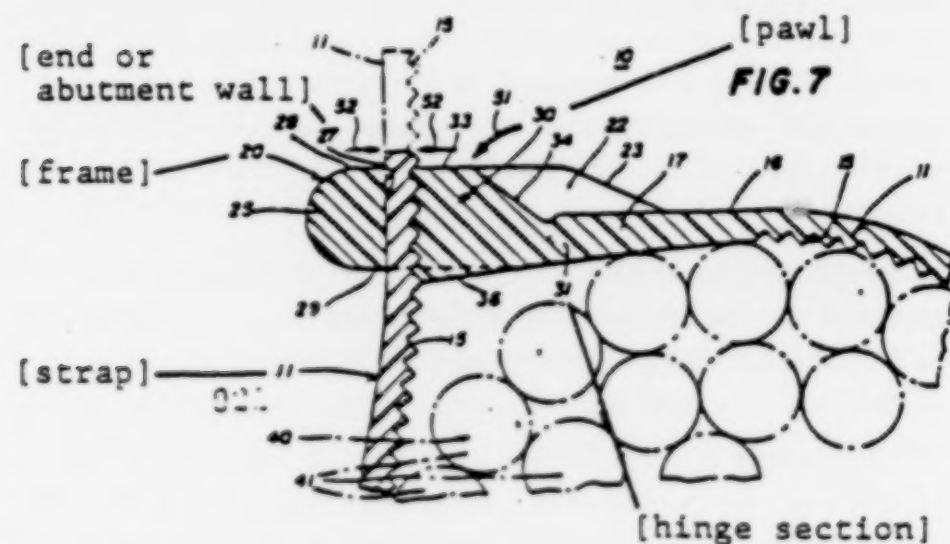
patents in suit. Primary among its advantages are the minimal force required to deflect the locking member when the strap is inserted through the frame and the high force required to withdraw the strap from the frame. Jack Caveney was the first to envision and achieve a cable tie having a higher ratio of low strap insertion force and high strap withdrawal force than anyone else had ever achieved or thought possible. Panduit's commercial embodiment of the patents in suit achieves an insertion force of one-half pound and a withdrawal force of 80 pounds.

First sold in 1970, the tie of the '538 patent had by 1984 achieved annual sales of \$50 million, and was accounting for half of Panduit's total profits and 80 percent of its cable tie sales.

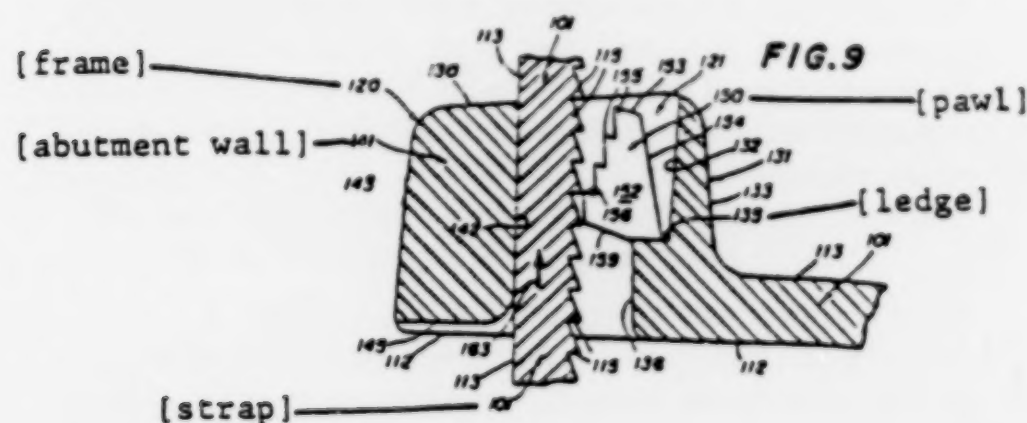
Beginning in 1968, Dennison Manufacturing Corporation (Dennison) put its staff of engineers and designers to work on a one-piece cable tie development program. It carried that program on at considerable expense for ten years, developing many ties and patenting some. None was successful. With the '869 patent before it, Dennison copied the tie claimed in that patent in 1976. When the '538 patent issued in 1976, Dennison thereupon copied the tie claimed in that patent. Having failed to succeed for over ten years with ties of its own design, Dennison achieved such success with its copy of the '538 tie as to make Dennison the second or third largest supplier of one-piece cable ties.

(3) *The Patents in Suit*¹

The '146 patent issued November 3, 1970 on an application filed August 6, 1968. Figure 7 is representative:

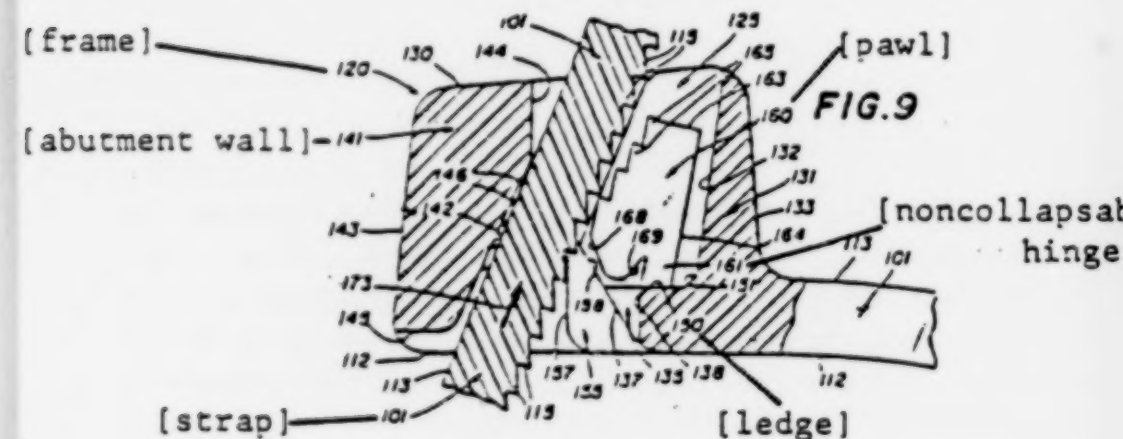


The '869 patent issued May 9, 1972 on an application filed May 1, 1969. Figure 9 is representative:



¹ Representative claims appear in the appendix to this opinion.

The '538 patent issued June 29, 1976 on an application filed May 5, 1969. Figure 9 is representative:



(4) *Infringement*

Dennison admits that the results of its research and development program, its Merser 8 and Merser 9 ties, "are covered by the representative claims of the patents-in-suit." Dennison's Merser 8 tie is admittedly covered by the asserted claims of the '146 and '869 patents. Dennison's Merser 9A tie is admittedly covered by the asserted claims of all three patents in suit. Dennison's defense was, accordingly, limited to its asserted invalidity of the patents in suit.

(5) *Proceedings before the District Court*

On December 14, 1978, Panduit sued Dennison, alleging infringement of certain claims of its '146 and '869 patents. Dennison answered on February 16, 1979, asserting invalidity of those patents. In 1981, Panduit amended its complaint, alleging infringement of certain claims of the '538 patent. Dennison's answer asserted invalidity of that patent.

After years of skirmish, trial was held on 13 dates between October 9 and November 8, 1984. A judgment was entered on

December 4, 1984, following the court's ruling from the bench in favor of Dennison.

(6) *The District Court's Decision*

(a) § 103

(1) *The '146 Patent*

The district court said the closest prior art reference was United States Patent No. 3,127,648 to Emery (Emery). Panduit had cited Emery to the Examiner, who considered it during prosecution. As evaluated by the district court, however, Emery "had a problem," i.e., "that the strap of the cable tie protruded from the head² when the cable tie was in tension," and because "there was only one tooth on the Emery tie . . . any pulling of the protruding end of the strap could easily disengage that one tooth."

[1.2] When Panduit at trial said the claimed subject matter was patentably distinct in view of plural teeth on the pawl, sequential engagement of the pawl teeth with those on the strap, and wedging of those engaged members against the abutting wall, the district court responded that what it called Panduit's "new elements" were "simply a description of one element, not three," saying: "it seems to me that one element has been broken down into three elements, and in so doing [Panduit] is able to argue that it has more patentable differences over Emery than I find to be the case."³

² The district court opinion refers to "the head" of the strap. The patents in suit speak of an "integral frame". The terms are here interchangeable.

³ What the court called "elements" were *limitations* in the claims. The court's merger of those separate limitations into what it called "one element" was in this case improper because the limitations give *meaning* to the various elements of the claims in suit. *Lindemann Maschinenfabrick GMBH v. American Hoist & Derrick Co.*, 730 F.2d 1452, 1459, 221 USPQ 481, 486 (Fed.Cir.1984).

(Footnote continued on following page)

In response to Panduit's argument that Emery did not wedge the strap against the abutment wall, the district court said that "the text of the Emery patent makes abundantly clear that Emery's intention was to achieve wedging against the abutment wall," and that such wedging "can only be accomplished if [it] is inside the head, because that is where the abutting wall is."⁴

[3] When Panduit pointed out that Emery's drawing clearly shows engagement of the pawl and strap outside the frame, the district court said:

Now, how do we account for the drawing? I can't account for that drawing . . . It's an aberration, it's an anomaly. And as I indicated a little earlier this afternoon, it is difficult to believe that someone whose only task was to make two drawings, could make a mistake on one of them when his business is making patent drawings. And yet, I adopt defendant's suggestion that what is represented by Figure 2 of Emery is a draftsman's error.⁵

(Footnote continued from preceding page)

Moreover, the number of elements is irrelevant, the sole question being whether the *claimed* subject matter as a *whole* would have been obvious. 35 U.S.C. § 103. *Richdel, Inc. v. Sunspool Corp.*, 714 F.2d 1573, 1579-80, 219 USPQ 8, 12 (Fed.Cir.1983).

⁴ Nothing in the text of Emery suggests an intention to wedge the strap against the abutment wall in the manner disclosed in the '146 patent.

⁵ Emery's drawing shows the pawl outside the frame and pressing the strap against the upper edge of the frame. Emery's sole independent claim says the pawl is "displaceable from within said frame" and returns "into said frame upon removal of said tongue end from said frame." Though the text says the pawl is "adapted to return to said normal position upon movement of said tongue portion in the reverse direction," the drawing, the claim, and the specification as a whole indicate that Emery's pawl returns *toward* its normal position upon reverse movement of the strap (tongue), but does not enter the frame until the strap is removed. The drawing referred to by the district court is the only drawing (of two) that shows the strap in use, and the representation of the pawl outside the head is a major

(Footnote continued on following page)

The district court concluded that the solution to Emery's "release problem" was "to add more teeth and put those teeth exactly where the intelligent reader of Emery would have known they should be, namely on the pawl, inside the head, gripping the strap against the abutment wall." The district court concluded that claim 24 was "necessarily implied in a decision to use multiple teeth," and that use of multiple teeth "was, nonetheless, obvious in light of the problem presented in Emery." To support that determination, the district court looked to two references cited during prosecution, each of which disclosed multiple teeth, concluding: "I don't even think it is necessary for anybody to teach [multiple teeth] in view of the fact that it was an obvious solution."

(II) The '869 Patent

The district court said, "the problem addressed by [the '869 patent] was insufficient strength of compression." The court attributed that "problem" to "the hinge"⁶ being positioned "essentially perpendicular to the axis of the strap." The district court said "[t]he solution devised by Caveney was to change the orientation of the pawl to a more or less vertical position, so that it would be essentially parallel to the axis of the tensioned strap, and then to place a ledge under the pawl to absorb the compressive force."

The district court found that "to increase the compressive strength of the cable tie, and specifically the pawl and hinge of the cable tie, you would set the pawl on a ledge." It further

(Footnote continued from preceding page)

segment of the drawing, emphasized by cross-hatching. No basis exists in the record for assuming that the inventor, the patent attorney, the draftsman, and the examiner would all have failed to notice the glaring aberration seen by the district court, if aberration there were.

⁶ A "hinge" is nowhere disclosed or discussed in the drawings, or claims, or specification of the '869 patent. A horizontal neck is shown in the '146 patent.

found that "it is obvious that a ledge should be an integral part of the head of the tie," and that "extending the ledge from side wall to side wall is an obvious way of accomplishing that."

The district court also looked to three references: United States Patent No. 3,484,905 to Eberhardt (Eberhardt), filed over three months after the '869 patent application (as a "contemporaneous development"); United States Patent No. 3,214,808 to Litwin (Litwin); and Japanese Utility Model Publication No. 27023/1964 (Japanese patent), the first two of which had been cited during prosecution. The court said those references "showed structures analogous to the '869 ledge in that they absorbed compressive force."

The court concluded that "the result achieved by introducing a ledge in the '869 patent was altogether expected," saying that "where the result of a rather ordinary step is exactly what you would expect . . . that is an argument for obviousness," and that the claimed invention of the '869 patent would "be obvious⁷ both on general principles of physics and in light of the Japanese patent and Litwin patent."

(III) The '538 Patent

The district court said the "principal problem" addressed in the '538 patent was that the pawl of the '869 patent was not sufficiently flexible, and that its teeth tended to break off when tensioned in a "file like action". This it termed the "rigidity" problem, saying:

Now, if the problem is rigidity, the opposite of rigidity is flexibility. So it seems to me that the person of ordinary

⁷ The district court, and counsel for both parties on appeal, use the phrase "would be obvious". The invention is not being made or to be made in future. The phrase moves the mind to the present and future. There is no reason to avoid, and every reason to insist upon, use of the *statutory* phrase "would have been", 35 U.S.C. § 103, which tends to remind the decisionmaker of the need to cast the mind back to "the time the invention was made", 35 U.S.C. § 103.

skill in the art, when recognizing the problem—and that, incidentally, would not have been difficult—there is testimony in the record that the problem was obvious, the problem itself was obvious—the teeth were being filed off—the person of ordinary skill in the art would necessarily think in terms of making the pawl more flexible than it was. The objective would be to achieve some way of enabling the pawl to get out of the way of the strap as it moved past so that the teeth would not be filed off.

The district court said the '538 patent avoided the rigidity problem by using what it called a "discrete hinge," which it in turn called the "essence of the '538 patent." That "solution" was necessary, it believed, because only a discrete hinge could achieve flexibility while not interfering with multiple engagement of the teeth.

The district court pointed to what it termed "hinges and discrete hinges" in the Emery, Litwin, and Fein patents, and to United States Patent No. 3,486,201 to Bourne (filed three months after the '538 patent application) (as a "contemporaneous development").⁸

The district court also said the '146 patent showed a "discrete hinge" and thus was "perhaps the most relevant prior art".⁹

⁸ All of the cited patents were before the examiner. None discloses a hinge as claimed in the '538 patent. Fein discloses a rigid pawl and no hinge. As shown in unchallenged exhibit PX77, Bourne discloses no hinge of any kind.

⁹ In so finding, the court ignored the unrebutted testimony that the neck shown in the '146 patent was *horizontal*, would be *weakened* if made more discrete, and would be in shear when subjected to withdrawal force. It also ignored the increase in withdrawal resistance from 25 pounds (the '146 patent) to 80 pounds (the '538 patent).

If the '146 invention rendered obvious those claimed in the '538 patent, moreover, it is at least surprising that Panduit would have continued its research program for seven more years and spent millions after reducing the '146 invention to practice in 1961.

The district court said Panduit claimed the discrete hinge in the '538 patent in language that "described a number of necessary characteristics of the same element as though they were separate elements."¹⁰

The primary prior art basis for the court's holding obvious the claimed inventions of the '538 patent was that the '538 patent offered "nothing . . . other than a discrete hinge, that is new over the '869 patent."¹¹

(IV) Objective Evidence

Respecting the objective evidence (the so-called "secondary considerations"), the district court said: "Mr. Cavaney and Mr. Moody and Panduit have designed and perfected an excellent and, indeed, preeminent commercial product. And the fact that they have done so contributed greatly to the difficulty of this case. It is not easy to find something obvious in the fact of those facts. And I do so with great reluctance and great resistance."

(V) Concluding Remarks Respecting § 103

Summarizing, the district court described Panduit's approach as "flawed by two errors".

¹⁰ It is, however, precisely those "characteristics" set forth as limitations in the claims, that distinguish and give meaning to the claimed hinge, that make the claimed hinge effective with the other elements of the claimed combination, that help make the commercial embodiment of the claimed invention the most successful product in its field, and that led Dennison to copy it. Respecting the district court's reference to "same element", see n. 3, *supra*.

¹¹ The '869 patent, however, was *not* prior art to the inventions claimed in the '538 patent. The inventions claimed in the '869 patent were conceived and reduced to practice *after* those claimed in the '538 patent. That the application for the latter was filed 4 days after that for the former, and resulted in a patent issued 4 years after the former, appears to have caused the court's mistake of treating the '869 patent as prior art.

First, it said Panduit's claims split "what are essentially the same element into a number of parts."¹² and presented "confusing claims to the Patent Office over a long series of patent applications for various cable ties," accompanied by "inconsistent and self-contradictory arguments."¹³

Second, it said that Panduit overly relied on the absence from the prior art of anything even close to the claimed inventions, saying Panduit gave "insufficient attention to what is taught by general engineering principles and general principles of physics and, indeed, the common experience of mankind."¹⁴

(b) Section 102(g)

Respecting Dennison's allegation of invalidity of the '146 patent under 35 U.S.C. § 102(g), the district court determined that, in reducing to practice the subject matter of the '146 patent in 1961 and filing an application in 1968, Panduit had not "forfeited any of its patents," that Dennison failed to show "prejudice, reliance, or some change in position," and that "mere delay [in filing] without more does not result in forfeiture."

(c) Double Patenting

In its statement, the district court upheld this defense in two sentences:

Turning to the question of double patenting, I find that there is double patenting. The reason for this is that

¹² see n. 3, *supra*.

¹³ Those "confusing claims" and "inconsistent and self-contradictory" arguments were not further described or identified by the district court, and we cannot find them in the prosecution histories of the patents in suit. Claim multiplicity does not itself reflect either claim confusion or inconsistency or contradiction.

¹⁴ The district court said testimony of Caveney and other Panduit witnesses was entirely credible, but that credibility of witnesses played a very small part in its obviousness determination.

the discrete hinge in the '538 patent is not a patentable difference over the '869 patent.

(d) Copying

The district court found that Dennison copied the claimed inventions of the Panduit patents, saying "[i]f there were any doubts on that, it would have been dispelled by Dennison's failure to bring to court the people who could have denied that, if it were possible to deny it." Instead, it said, Dennison's witnesses had "secondhand and relatively remote connection with the accused devices," and their testimony was "of very little assistance."

(e) Attorney Fees

The court denied Dennison's demand for attorney fees, saying "this is not an exceptional case within the meaning of the statute." It viewed Panduit's suit neither as frivolous nor brought in bad faith, and noted that "there is room for some difference of opinion here based largely upon those secondary considerations that have given me such trouble in the case: failure by others, copying by Dennison, and unquestioned commercial success of the plaintiff."

Issues Presented

(I) Whether the district court erred in holding the claims in suit invalid for obviousness.

(II) Whether the district court erred in holding the claims of '538 patent invalid for double patenting.

(III) Whether the district court erred in refusing to hold the claims of the '146 patent invalid under 35 U.S.C. § 102(g).

OPINION

(1) Obviousness

(a) The Landscape

The present record reflects the insidious and powerful phenomenon known in patent law as the use of hindsight, for in this case a most careful and conscientious judge, after voicing the caveat against it, was nonetheless victimized by that phenomenon.

That counsel may succeed in leading a court to disregard the statutory requirement for consideration of the claimed invention "as a whole", to look for its "essence" in a single feature, and to pick and choose features found somewhere in the prior art, though the court had recognized the impropriety of that decisional approach, is a second phenomenon forming part of the landscape of the present case.

That a court may misconstrue its role as requiring it to decide whether *it* considers an invention patentable, in place of the statutory requirement that it decide whether the patent's challenger has carried its burden of proving by clear and convincing evidence the facts compelling a conclusion of patent invalidity, *SSIH Equipment, S.A. v. U.S. Intern. Trade Comm'n*, 718 F.2d 365, 375, 218 USPQ 678, 687 (Fed.Cir. 1983), is a third phenomenon in the landscape of this case.

That a court may be led to concentrate on lawyers' games played with the patent in suit and those in the prior art, while allowing an obscuration of the real world story that forms a major part of the landscape of this case, is a fourth phenomenon here present.

At the outset of its statement from the bench, the district court reflected a clear instinct for the proper parameters of decisionmaking under 35 U.S.C. § 103:

It is not appropriate for the Court to engage in hindsight. Furthermore, it is not appropriate for the Court to pick and

choose isolated elements from various prior art references and combine them so as to yield the invention in question when such combining would not have been an obvious thing to do at the time in question.

* * * * *

I am satisfied that in plaintiff's patents we see the best of the art at the times in question. The '146 patent was better than anything else that then existed and the second two patents, the '869 and '538 patents, were that best at the time. In fact, [Panduit's] commercial embodiment of the '538 patent appears to be the leader in the industry. As I have remarked at various times during the trial, the evidence is simply overwhelming that Dennison copied the '538 patent.

Now, this commercial success, the failure of others and the copying by Dennison argue strongly in favor of non-obviousness. In addition, of course, [Panduit] has the benefit of the rule that the presumption of validity of the patent can be overcome only by clear and convincing evidence.

It is with these caveats firmly in mind that I will now undertake an analysis of each patent.

There was an eleven day recess in the closing arguments. Before the recess, the district court had said, "obviously no previous patent showed the combination at issue here. I am not persuaded that this invention is similar to any one piece of prior art," and "other people were going in different ways and did not arrive at the Caveney structure or anything substantially identical to it."

The present case establishes that, even on a journey to decision so well begun, a busy court may lose its way. Speculation on just which fork in the road led to error is fruitless. There were, moreover, numerous forks and numerous errors.¹⁵

¹⁵ At the end of its statement from the bench, the district court exhibited uncertainty respecting its obviousness conclusion, along with

(Footnote continued on following page)

(b) The Errors

En route to its decision on obviousness, the district court was led to these errors:

- (1) It employed the benefit of hindsight.
- (2) It misinterpreted the claimed inventions.
- (3) It misevaluated the prior art.
- (4) It misconstrued its role.
- (5) It applied an improper and impossible standard of obviousness.
- (6) It gave too little weight to the objective evidence of non-obviousness and the real world story reflected in that evidence.

(1) Hindsight

The record compels the conclusion that the district court, having heard many days of testimony from the inventor Caveney, was unable to cast the mind back to the "time the invention was made." 35 U.S.C. § 103. court did not, as the statute requires, view the prior art from the perspective of one skilled in the art and uninformed by that testimony. Caveney described in detail the shortcomings of prior art cable ties and the superiority of cable ties constructed in accord with the

(Footnote continued from preceding page)

substantial prescience respecting the outcome of this appeal:

I have been going back and forth on this thing in my mind throughout the trial. It gives me great comfort to know that I am just the first stop on this trip. Everything I have said here can be analyzed just as well by the Court of Appeals for the Federal Circuit.

All the documents are here, the testimony is there for them to read, and if they come to a different conclusion than I, so be it.

claims in suit. In deciding the obviousness question, the district court looked to knowledge taught by the inventor Caveney, in his patents and in his testimony, and then used that knowledge against its teacher.

[4] The test is whether the subject matter of the claimed inventions would have been obvious to one skilled in the art at the time the inventions were made, *not* what would be obvious to a judge after reading the patents in suit and hearing the testimony. In the present case, for example, there is no way that one skilled in the art in 1961 and 1968 (necessarily unaided by knowledge of the patents in suit and Caveney's testimony) would find in the prior art either a teaching or a suggestion of the claimed inventions.

Though hindsight was applied to all of the claims and references, a few examples are illustrative. There is no way one skilled in the art would have focused on an incomprehensible phrase in *Fein*, and ignored his disclosure of a rigid pawl; or would have focused on multiple teeth in *Fein* and *Litwin*, while ignoring how those reference structures function and the total absence of an abutment wall; or would have known that the teeth must be "in a straight line and equidistant from the surface of the abutment wall"; or would have learned from the Japanese and *Litwin* patents, which disclose manually releasable pawls, how to design the non-releasable pawls of the claimed inventions. *W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1550, 220 USPQ 303, 311 (Fed. Cir. 1983). Most importantly, nothing whatever in the prior art would have suggested to one skilled in the art how to produce a cable tie with a one-half pound insertion force and an 80 pound withdrawal force.¹⁶

¹⁶ That one *could* invent such a cable tie is unquestioned. Caveney *did*. The question, however, is never whether an invention *could* be made, but whether there is anything in the prior art as a whole that would have rendered its making obvious to one skilled in the art when the invention was made.

The use of hindsight was the more egregious here, where, as discussed below, the court applied a subjective view based on "engineering principles and general principles of physics" and "the common experience of mankind" in the face of a record establishing that those "principles" and that "experience" did not for years suggest the claimed inventions to numerous earlier workers skilled in the art, including Dennison's engineers.

This court and one of its predecessors have cautioned against the use of hindsight:

It is difficult but necessary that the decisionmaker forget what he or she has been taught at trial about the claimed invention and cast the mind back to the time the invention was made (often as here many years), to occupy the mind of one skilled in the art who is presented only with the references, and who is normally guided by the then-accepted wisdom in the art.

W.L. Gore & Assocs., Inc. v. Garlock, Inc., 721 F.2d at 1553, 220 USPQ at 313.

It is impermissible to first ascertain factually what appellants *did* and then view the prior art in such a manner as to select from the random facts of that art only those which may be modified and then utilized to reconstruct appellants' invention from such prior art.

In re Shuman, 361 F.2d 1008, 1012, 150 USPQ 54, 57 (CCPA 1966).

In *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1538, 218 USPQ 871, 879 (Fed.Cir.1983), this court noted the conflict with the statute, 35 U.S.C. § 103, when the test applied is whether the claimed invention would have been obvious, not to one skilled in the art when the invention was made, but "to a judge or other layman after learning all about the invention."¹⁷

¹⁷ At the end of its statement from the bench, the court said, "[i]t is primarily, it seems to me, a matter of applying your experience to

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(2) Misinterpretation of the Claimed Inventions

[5] The statute requires that the subject matter of the claimed inventions be considered "as a whole". 35 U.S.C. § 103. In the present case, the district court interpreted the claims of the '146 patent as though they were drawn to "multiple teeth", those of the '896 patent as though they were drawn to a "ledge", and those of the '538 patent as though they were drawn to a "hinge". That was error.¹⁸

The court was apparently led into the instant error by defense counsel's contention that each patent should be evaluated for what counsel called its "essence". In so arguing, counsel misled the court in respect of the law when he told the court that if it upheld the validity of the patents it would be telling the entire industry:

"You can't have more than one parallel tooth." (re the '146 patent);

(Footnote continued from preceding page)

the undisputed facts." If, as its context indicates, the "experience" intended was that of the judge, the approach is error: (1) so far as the record discloses, the court had *no* experience in the art of designing cable ties; (2) the "facts" of every reference were disputed; (3) it is a matter of determining the facts on all the evidence and then applying the law, not the judge's "experience", to those facts.

¹⁸ The error is compounded here: (1) "multiple teeth" had nothing to do with allowance of the '146 patent, the Examiner having cited the two references pointed to by the district court as disclosing multiple teeth and Emery itself disclosing multiple serrations; (2) the "ledge" and "hinge" were not naked in the claims, but were set forth with particular characteristics and relationships to other elements in the combinations claimed; (3) the district court here lost sight of the fundamental rule that "it is the claims that measure the invention." *Aro Mfg. Co., Inc. v. Convertible Top Replacement Co., Inc.*, 365 U.S. 336, 339, 81 S.Ct. 599, 600, 5 L.Ed.2d 592, 128 USPQ 354, 356-57 (1961); *Bandag, Inc. v. Al Bolser's Tire Stores, Inc.*, 750 F.2d 903, 922, 223 USPQ 982, 996 (Fed.Cir.1984); *Jones v. Hardy*, 727 F.2d 1524, 1528, 220 USPQ 1021, 1022 (Fed.Cir.1984).

"You can't mount a pawl on a ledge." (re the '869 patent);

"You can't use a neck in there when you support your pawl." (re the '538 patent).

[6, 7] Counsel knew, or should have known, of the falsity of the foregoing statements. Those statements mistate the law of validity and the law of infringement. As above indicated, validity is determined on the basis of the claimed subject matter as a whole, 35 U.S.C. § 103, not in respect of a single element. Similarly, infringement of a claimed combination requires the presence of an accused structure of each claimed element, or its equivalent. Upholding of the patents in suit does not, therefore, preclude any worker in the art from employing multiple teeth, ledges, and hinges in whatever combinations the worker may desire, so long as those combinations are distinct from those claimed in the present patents.

This court has cautioned against the claim dissection that occurred here:

Though it is proper to note the difference in a claimed invention from the prior art ... it is improper ... to consider the *difference* as the *invention*. The 'difference' may have seemed slight (as has been the case with some of history's great inventions, e.g. the telephone), but it may have been the key to success and advancement in the art resulting from the invention.

* * * * *

Hence the statute, the law established not by judges but by Congress, requires that the invention as claimed be considered "as a whole" when considering whether that invention would have been obvious when it was made. 35 U.S.C. § 103.

Jones v. Hardy, 727 F.2d 1524, 1528, 220 USPQ 1021, 1024 (Fed.Cir.1984).

(3) *Misevaluation of the Prior Art*

[8] The well established rule of law is that each prior art reference must be evaluated as an entirety, and that all of the prior art must be evaluated as a whole. See *W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721 F.2d at 1550, 220 USPQ at 311; *In re Kuderna*, 426 F.2d 385, 390, 165 USPQ 575, 578-79 (CCPA 1970). The rule, as rules should, cuts both ways.

Inventions have often been held to have been obvious where no single reference disclosed the claimed invention, and in the face of arguments that the reference structures could not practically be "combined". That result was compelled because the art as a whole in those cases suggested the combination claimed. See, e.g., *In re Yamamoto*, 740 F.2d 1569, 1573, 222 USPQ 934, 937 (Fed.Cir.1984); *Orthopedic Equipment v. United States*, 702 F.2d 1005, 1013, 217 USPQ 193, 200 (Fed.Cir.1983).

At the same time, inventions have been held to have been nonobvious where neither any reference, considered in its entirety, nor the prior art as a whole, suggested the combination claimed. See, e.g., *Fromson v. Advance Offset Plate, Inc.*, 755 F.2d 1549, 1556, 225 USPQ 26, 31 (Fed.Cir.1985); *ACS Hospital Systems, Inc. v. Montefiore Hospital*, 732 F.2d 1572, 1577, 221 USPQ 929, 932-33 (Fed.Cir.1984). That is the circumstance of record here.

Nowhere did the district court indicate where in the prior art there might be a suggestion for combining teachings of individual references, or how, if there were such suggestion, such a combination would equal any of those claimed in the patents in suit. There was here simply nothing in the prior art to rebut the presumption of validity to which the patents in suit are statutorily entitled.

What happened here occurred in *W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721 F.2d at 1550, 1552, 221 USPQ at 311, 312, where this court stated:

In its consideration of the prior art, however, the district court erred . . . in considering the claims in less than their entirety . . . and in considering the references in less than their entirety, i.e., in disregarding disclosures in the references that diverge from and teach away from the invention at hand. . . .

* * * * *

. . . The result is that the claims were used as a frame, and individual naked parts of separate prior art references were employed as a mosaic to recreate a facsimile of the claimed invention.

As indicated in notes 2-5, and 7-10, *supra*, the court made specific technical and legal errors in evaluating the individual prior art patents, none of which was even close to the claimed inventions. The court made a basic error under the influence of hindsight, when it found in the prior art "problems" which were not extant in that prior art, but which were problems inventor Caveney had seen and solved and told the court about. The errors cited in the foregoing notes need not be further discussed here.

Three fundamental errors resulted from a disregard of the decisional parameters governing the proper evaluation of prior art. The first, as above indicated, was the picking and choosing of "teeth", "ledges", and "hinges" either absent from the prior art references or there disclosed in entirely distinct form, characteristics, and relationships. It must be remembered that the Examiner is required to consider references in their entirety, i.e., including those portions that would argue against obviousness. The statute governing the obvious/non-obvious determination in light of the prior art, 35 U.S.C. § 103, is as applicable to courts as it is to Examiners. Courts are not, of course, bound by the Examiner's determination, but a court's route to a contrary determination is governed by the same statute, and must not be based on a superficial review of the prior art like that here employed.

[9] The second fundamental error was a disregard of the Examiner's consideration of all but one of the references relied on by Dennison, and of the irrelevancy of that one reference (Japanese patent, disclosing a releasable pawl). Nowhere does the district court indicate any basis for its disagreement with the Examiner's evaluation of the references, an oversight that may have been prompted by defense counsel's statement to the court: "The fact that the Patent Office [sic] allowed a claim is little evidence of whether there is anything patentable in the claim." Under the statute, 35 U.S.C. § 282, the fact of allowance is at least sufficient "evidence" to place on the challenger the burden of proving the Examiner wrong.

[10] The third fundamental error was the refusal of the court to credit the real world environment surrounding the inventions disclosed in the reference patents and in the patents in suit. Referring to the reference structures, the court paid no attention to insertion and withdrawal forces in the reference structures, or to the striking differences in the references, treating them as equivalents of each other. The court specifically stated, "I don't need to know all the details about how all these other things work or don't work." But "how things work" is critical to encouragement of every research and development activity, and every advancement of the arts useful to the public, the very purposes of the patent system.

It was precisely "how things work" that made the prior art cable ties failures and the cable tie of the patent in suit the most successful in the history of the industry. It was "how things work" that caused Dennison's ten year development to fail and led Dennison to copy the tie of the patents in suit. It was "how things work" that enabled Caveney alone to achieve a one-half to 80 pound ratio between insertion and withdrawal forces. And it was a refusal to consider "how things work" that caused the court to cite isolated minutiae from various references, while ignoring critically important structural *distinctions* that signifi-

cantly affect the different achievements of which the reference and claimed structures are capable.¹⁹

[11] The court appears to have been led, at least in part, to its erroneous evaluation of the prior art by defense counsel's trial tactic. Working at a large easel, counsel made free-hand sketches. Beginning with a sketch purported to represent a prior art structure (but with no claimed feature), counsel added a ledge, or a hinge, or a frame, and in minutes produced a cable tie design having all the features set forth in a claim. Counsel then offered his completed sketches as exhibits. They were admitted over Panduit's "strong objection". The court's statement from the bench indicates that it substituted counsel's sketches for the prior art patents, and that it was impressed with the ease and speed with which counsel created the claimed inventions in the courtroom. That procedure was inappropriate.

Counsel was not under oath and not subject to cross-examination. Admission of his "testimony" in the form of his sketches was non-probative. As above indicated, prior art references must be evaluated on what they taught or suggested in their *entireties* when the invention was made, not on hypothetical modifications made with knowledge of the invention *in suit* many years later. That rule is applicable to witnesses and, in even greater force, to counsel's "testimony". There was simply no justification for the conjectural modifications reflected in counsel's sketches. See *Carl Schenck, A.G. v. Nortron Corp.*, 713 F.2d 782, 787, 218 USPQ 698, 702 (Fed.Cir. 1983) ("modification unwarranted by the disclosure of a reference is improper").

Dennison does not rely on its counsel-prepared exhibits before this court. That is well, for the record is compelling that the inventing of cable ties in *not* the simple matter reflected in

¹⁹ The court's disinterest in how things in the prior art work caused it to disregard, *inter alia*, the effect of whether various elements in the prior art were in shear or in compression under load.

the trial tactic of defense counsel. Panduit invested nine years and several million dollars before achieving the successful tie of the patents in suit. Dennison tried for ten years, at a presumably similar expense, and failed. Dennison's prior art book contained twelve patents on pre-Caveney cable ties that were either never sold or were hopelessly outclassed in the marketplace by the cable tie of the patents in suit.

Indeed, it was *only* the district court who believed that cable tie inventing was a simple, obvious, routine matter of finding elements in the prior art and modifying them in accord with "principles of physics" and "common experience". To reach that belief, the court had to ignore what workers of ordinary skill *did* in the real world with those same principles and that same experience over the years (as shown in the whole of the prior art references). It also had to ignore the testimony of Dennison's own deposition witnesses. Dennison's chief engineer, Jack Stewart, said "the design of these ties is not as simple as it may appear on the surface." Stewart also said Dennison's research program was "tantalizingly close to success on many occasions." Dennison's senior engineer, Joyce, said "a good tie is a damn difficult thing to design, extremely difficult."²⁰

Properly evaluated, the prior art in this case confirms the non-obviousness of the claimed inventions in suit. The mis-evaluation applied here was of such nature as to destroy any patent. It was plain error.

(4) *The Role of the Court*

[12-14] Patents are born valid. 35 U.S.C. § 282; *Roper Corp. v. Litton Systems, Inc.*, 757 F.2d 1266, 1270, 225 USPQ 345, 347 (Fed.Cir.1985). It is not, therefore, a required role of

²⁰ Presumably arguing a different point, defense counsel stated to the district court "even where you are making millions of these, a tiny amount of plastic makes a big difference."

a court, in a suit for patent infringement, to declare patents valid.²¹ Nor is it the court's role to start from scratch, as a surrogate Examiner, to referee *de novo* a dispute on the validity question.

Though that procedure would render the Patent and Trademark Office (PTO) unnecessary, it was essentially followed here. As above indicated, courts are clearly not bound by the events in the PTO or by its decisions. *Fromson v. Advance Offset Plate, Inc.*, 755 F.2d at 1555, 225 USPQ at 31. On the other hand, there is no point or value in, and no warrant for, proceeding as though nothing happened before suit except the naked issue of a patent.

The statute mandating a presumption of validity, 35 U.S.C. § 282, places the burden of proving facts compelling a conclusion of invalidity on the party asserting invalidity. This court has said the burden of proving facts compelling a conclusion of patent invalidity must be carried by clear and convincing evidence. *SSIH Equipment, S.A. v. U.S. Intern. Trade Comm'n*, 718 F.2d 365, 375, 218 USPQ 678, 687 (Fed.Cir.1983). The role of the court is to determine whether the validity challenger carried that burden. If the court determines that that burden was not carried, it need only so state. If the court determines that that burden was carried, it should declare the patent invalid. See *Lindemann Maschinenfabrick GMBH v. American Hoist & Derrick Co.*, 730 F.2d 1452, n. 1, 221 USPQ 481, 484 n. 1 (Fed.Cir.1984).

²¹ A suit brought only for a declaration that a patent is valid would be as stated an anomaly, the patent being presumed valid under the statute. A patentee who in an infringement suit asks the court to hold his patent "valid and infringed" states a redundancy (there is no liability if the patent be invalid). The unnecessary request for a "valid" holding also suggests a blurring of the burden assignment. However the issue arises, the burden of proving a patent *invalid* lies on one who asserts invalidity. 35 U.S.C. § 282.

Though the court here referred at the outset to the presumption of validity, mere lip service is insufficient. If the statute is not to be nullified, courts and lawyers must render it more than a mere nod in passing. It must be applied. Counsel for the patent should not undertake the non-existent initial burden of *proving validity*, but must be prepared to rebut whatever case of invalidity may be made by the patent's challenger. If counsel so misperceive their roles as to indicate a reversal, it should not be surprising that a court may be led to misperceive its own.

In the present case, as indicated above, n. 14, the district court said it had been "going back and forth" on the question of obviousness. It recognized the possible decisional influence of an overwhelming record of objective evidence (commercial success, failure of others, others going a different way, copying by Dennison), saying "this is a case that raises that question about as squarely as any I've encountered." It praised the "patents" [sic, claimed cable ties] as "better than anything else that then existed" and "best at the time." It said "there is room for some difference of opinion here based largely on those secondary considerations that have given me so much trouble in the case." Noting the cable tie of the patents in suit was an "excellent and, indeed preeminent commercial product," the court said it was "not easy" to reach its obviousness conclusion, but "I do so with great reluctance and great resistance." The court's uncertainty should have, in view of § 282, ended the obviousness inquiry.

It is at best difficult to find in the words of the court a firm conviction that Dennison had carried its burden of establishing facts supporting invalidity of the patents in suit by clear and convincing evidence. On the contrary, the court indicated that it was not considering that question, but was considering whether *it* thought the claimed inventions obvious, and was, moreover, in substantial doubt on even that score.

Thus the district court gave too little, if any, effect to the presumption of validity, 35 U.S.C. § 282. That presumption is procedural, placing the burden of its rebuttal on the patent challenger. The rebuttal here presented by Dennison was based on prior art references fully considered by the Examiner who examined all three patents in suit, and a cumulative reference. As above indicated, those references, when properly evaluated, were, individually and collectively, totally inadequate. A proper evaluation of the prior art would therefore have established the failure of Dennison to carry its statutory burden and would have ended the obviousness inquiry in this case.

(5) *Improper and Impossible Standards*

(a) *General Principles and Common Experience*

[15] As above indicated, the district court in reaching its obviousness conclusion relied heavily on what it thought was "taught by general engineering principles and general principles of physics and, indeed, the common experience of mankind."²² That approach is error for a number of reasons.

First, it is in conflict with the statute. Section 103 says nothing of such "principles" and "experience", but refers to

²² At another point, the court said, "The thing I find troublesome for the plaintiff here is the question of whether the solution to each of the various problems presented by the art were not obvious based upon engineering principles generally." The difficulty with that statement is at least four-fold: (1) the problems were not "presented by the art", but were recognized and solved by Caveney, as he testified; (2) the "engineering principles" were those employed by and described in the testimony of Caveney; (3) the same engineering principles were available to all workers in the art, including Dennison's, but for years did not produce in their hands the industry-leading product claimed in the patents in suit, and; (4) the statute, 35 U.S.C. § 103, removes from consideration the "manner" in which the invention was made.

Dennison on appeal makes no effort to support and does not mention the court's reliance on "principles" and "experience".

whether the subject matter of inventions not anticipated by something in the "prior art" would nonetheless have been obvious in view of that art.

Second, it is in conflict with the patent examining system, which is based on examination of application claims in light of the prior art.

Third, it raises a standard impossible for any patent to meet. Humans do not create from nothing; they must employ the principles of engineering and physics and their experience. *Fromson v. Advance Offset Plate, Inc.*, 755 F.2d at 1556 n. 3. 225 USPQ at 31 n. 3. It cannot be the law that the only inventions patentable are those that cannot be explained by any known principles of engineering or physics. This court understated the point in *Lindemann Maschinenfabrick GMBH v. American Hoist & Derrick Co.*, 730 F.2d at 1462, 221 USPQ at 489, when it said: "That the claimed invention may employ known principles does not in itself establish that the invention would have been obvious. Most inventions do."

Fourth, the "principles" and "experience" here referred to were those taught the court by the inventor Caveney. There was no evidence on which it could be said that one deprived of Caveney's testimony would have been led by general principles and common experience to make the claimed inventions in suit. Indeed, the evidence was to the contrary. The district court's reliance on general principles and common experience simply ignored what actually happened in the cable tie industry over many years, including Dennison's failed decade of research. It also ignored the testimony of Dennison's engineers Stewart and Joyce, *supra*, in which they described the difficult nature of cable tie design work.

Whatever the unidentified "principles" of engineering and physics the court intended, and whatever was the non-described "common experience of mankind" the court had in mind, those principles and that experience were fully available to all who

tried and failed before Caveney succeeded. They cannot serve as a basis for holding that the claimed inventions in suit would have been obvious under § 103.

(b) *Unexpected Results*

During closing argument, *after* the 11-day recess, Dennison's counsel handed the trial court a copy of this court's decision and opinion in *In re Sernaker*, 702 F.2d 989, 217 USPQ 1 (Fed.Cir.1983) and implied that this court required an "unexpected result" in support of nonobviousness, saying that *Sernaker* "capsulizes the feelings of the Court of Appeals for the Federal Circuit." Dennison's counsel then went on to cite *Sernaker* as *requiring* an unexpected result in relation to each patent in suit, saying, for example, in respect of the '538 patent:

... it is exactly what *In re Sernaker* says is not an invention [sic, is not patentable] because what you achieve by adding a hinge is exactly what you expect to achieve. You achieve flexibility. You do not get an unexpected result.

As above indicated, the district court, *before* the recess, noted that "other people were going in different ways" and "did not arrive at the Caveney structure." The court also said at that time that he was impressed that "other people faced with the same problem did not arrive" at Caveney's result, and that the strongest argument against randomly combining features of the prior art was "what other people were doing contemporaneously." After hearing the argument of Dennison's counsel based on *Sernaker*, the district court proceeded to find that Caveney's inventions produced no "unexpected result".

[16] Dennison's counsel misstated the law to the district court. *Sernaker* does not hold that an "unexpected result" is required before a conclusion of nonobviousness may be reached, and does not "capsulize" this court's "feeling" that such a requirement exists. On the contrary, this court has specifically pointed out that, while an "unexpected result", like

"synergism", may be *evidence* of nonobviousness, it is *not* a requirement. See *Lindemann Maschinenfabrick GMBH v. American Hoist & Derrick Co.*, 730 F.2d at 1461, 221 USPQ at 488; *American Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1360-61, 220 USPQ 763, 771 (Fed.Cir. 1984).²³

Moreover, if there were a requirement for an "unexpected result", that requirement would have been fully met here. That the achievement of a ½ to 80 pound ratio between insertion and withdrawal forces was unexpected is fully reflected in the totality of the evidence. That that achievement was not mentioned by the district court reflects not its absence but the court's overconcentration on a superficial review of the prior art and disregard of the claimed structural characteristics and relationships that produced that achievement.

(6) *Objective Evidence*

The human, real world story in evidence here not only reflects the inadequacy of the prior art, but compels a conclusion of non-obviousness of the claimed inventions in suit.

As above indicated, the cable tie of the patents in suit was an outstanding commercial success, selling at over \$50 million a year by 1984 and becoming, early on, the unquestioned leading tie on the market. With all that waiting on the successful invention of a superior cable tie, the district court did not explain why, if Caveney's superior cable tie would have been so obvious, the many inventors that preceded Caveney did not find it so.

It is extremely difficult to believe that Panduit and Dennison would have invested years and millions of dollars in an

²³ Though *Sernaker* was so heavily relied upon in the after-recess closing argument to the trial court, Dennison nowhere mentions it before this court, the source of that authority; nor does Dennison argue "lack of unexpected result" in its brief here.

effort to achieve what had been obvious all along to all of ordinary skill in the art.

[17] That many others, including Dennison, had tried for years and failed to create a superior cable tie is virtually irrefutable evidence that the superior tie of the patents in suit would not have been obvious to those skilled in the art when it was invented.

That earlier workers were, as the district court correctly said, "going in different ways" is strong evidence that inventor Caveney's way would not have been obvious.

That Dennison, a large corporation with many engineers on its staff, did not copy any prior art device, but found it necessary to copy the cable tie of the claims in suit, is equally strong evidence of nonobviousness. As was once so well said, of an infringer and the invention appropriated: "It gives the tribute of its praise to the prior art; it gives the [invention] the tribute of its imitation, as others have done." *Diamond Rubber co. v. Consolidated Rubber Tire Co.*, 220 U.S. 428 441, 31 S.Ct. 444, 450, 55 L.Ed. 527 (1911).

It is at least incongruous for a court to say a commercially successful, industry-leading invention would have been obvious (to it) in view of the prior art and "principles/experience", when the record clearly establishes that when the invention was made it had *not* for years been obvious to earlier workers in the art, to the defendant's experts, or to the Examiner—all of whom had before them the *same* prior art and the *same* "principles/experience."

[18, 19] Dennison's brief limits its argument on the objective evidence essentially to an attack on the commercial success of the cable tie of the patents in suit.²⁴ That attack is without merit. First, it comes with poor grace from an infringer

²⁴ Dennison's brief here purports to deny its ten-year struggle to develop a successful cable tie before it finally elected to copy the tie of

(Footnote continued on following page)

who achieved its own great commercial success and became the industry's second or third leader by making and selling its copy of that cable tie. Second, Dennison's suggestion that Panduit's success is due to unclaimed features or to its advertising or sales staff are either unsupported or contradicted in the evidence. Third, Dennison's attempt to limit Panduit's success to the tie claimed in the '538 patent makes no sense. That tie, and Dennison's copy of it, embodies all inventions set forth in all of the asserted claims in suit, and all are entitled to the benefit of the overwhelming success to which each has contributed.

That respect is required for the effect to be given objective evidence of nonobviousness, when that evidence is present, has been stated by this court. *W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1555, 220 USPQ 303, 314; *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1538, 218 USPQ 871, 879 (Fed.Cir.1983).

The objective evidence is here so strong as to have withstood prior art references substantially more pertinent than those relied upon by Dennison. If it was ultimately given any weight by the district court, that weight was insufficient. In evaluating the objective evidence and its thrust, the district court erred.

(Footnote continued from preceding page)

the '538 patent. That denial is in direct conflict with the uncontroverted evidence of record.

Dennison also says the district court gave due weight to the objective evidence because it "considered" it. A perfunctory statement is but lip service. Objective evidence *must* be given its appropriate effect, and, as the text makes clear, that was not done here.

Dennison's brief does not repeat before us its mischaracterization presented to the district court of this court's decision in *W.L. Gore & Assocs. v. Garlock, Inc.*, *supra*. This court did not in that case hold that objective evidence is relevant only in "close" cases and when a court is "undecided."

(c) Conclusion On § 103

[20] The district court having erred in reaching its conclusion on obviousness under § 103, the portion of its judgment resting on that conclusion must be reversed.

(II) Double Patenting

[21] The district court, as above indicated, devoted two sentences to Dennison's double-patenting defense. It did not, nor does Dennison, compare the claims, or assert that the claims of the '869 and '538 patents are not patentably distinct, or that issuance of the '538 patent extended the term of the '869 patent. See *In re Longi*, 759 F.2d 887, 892-95, 225 USPQ 645, 648-50 (Fed.Cir.1985).

Nothing of record supports a double patenting defense. The court in effect simply and erroneously held the '538 patent invalid for obviousness under 35 U.S.C. § 103 in view of the '869 patent, and under the rubric of "double patenting". Because the '869 patent, is not prior art to the '538 patent, *supra*, n. 11, the patented invention cannot be held to have been obvious under § 103. Hence, that portion of the district court's judgment that rests on its double patenting determination must be reversed.²⁵ Moreover, had the district court properly applied the test for obviousness type double patenting by comparing the claims of both patents, it would have concluded that the '538 claimed invention is not an obvious variation of the '869 claimed invention.

(III) The '146 Patent and § 102(g)

Dennison, as it has a right to do, attempts to support the judgment with respect to the '146 patent by alleging error in the district court's rejection of its § 102(g) defense against that patent. The trial court found that Dennison was in no way

²⁵ As reflected in the text, the district court misinterpreted the '869 disclosures and the '538 claims.

prejudiced by a delay in the filing of the '146 patent application. Nothing of record would indicate that that finding was clearly erroneous.

[22] Dennison's effort to create a forfeiture out of the instant facts, arguing that Panduit "lost the patent right" by delay is meritless, as indicated by *Paulik v. Rizkalla*, 760 F.2d 1270, 1272, 226 USPQ 224, 225 (Fed.Cir.1985) (in banc), wherein it was stated:

This historic jurisprudence from which 35 U.S.C. § 102(g) flowed reminds us that "the mere lapse of time" will not prevent the inventor from receiving a patent. *Mason v. Hepburn*, 13 App.D.C. 86, 91, 1898 C.D. 510, 513 (1898). The sole exception to this principle resides in section 102(g) and the exigencies of the priority contest.

There is thus no basis for applying section 102(g) to mere delays in filing, except in priority contests where the equities between claimants for the same invention may be fully evaluated.

[23] Dennison tries to extend 102(g) to the present facts, arguing that Bourne invented the "concept" of the '146 patent. However, as above indicated, n.8, *supra*, Bourne discloses a non-hinged pawl. "Concepts" do not anticipate. The law looks to the particular inquiries set forth in 35 U.S.C. § 102(a)-(g), which focus on knowledge, use, sale, disclosure, etc., of the invention. Notions of "concept", "essence", "key", "gist", etc., are no more useful in the context of § 102 than elsewhere, because they divert the fact-finder's attention from the subject matter of the invention as a whole.

[24] "Anticipation" for the purposes of § 102 requires "the presence in a single prior art disclosure of all elements of a claimed invention arranged as in that claim". *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1548, 220 USPQ 193, 198 (Fed.Cir.1983). It is a finding of fact subject to the clearly erroneous rule. *Carman Ind. Inc. v. Wahl*, 724 F.2d 932 (Fed.Cir.1983); *W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721

F.2d at 1548, 220 USPQ at 309. The district court's refusal to find the '146 patent anticipated by Bourne was not clearly erroneous.

Where, as here, an alleged other inventor discloses at most a contemporaneous development distinct from the invention in suit, there is no basis for Dennison's suggestion that an extension of section 102(g) be created for application outside a priority contest.

(IV) Dennison's Presentation on Appeal

On appeal, Dennison proffers only superficial characterizations of the claimed inventions and the references, as it did before the district court. At no point does Dennison treat any claimed invention or any reference as a whole. The meaningless one-word descriptions of the claimed inventions and reference structures in Dennison's brief are of no use or assistance to this court.²⁶

Dennison misstates the record in arguing that the prosecution history of the '538 patent indicates that the hinge there shown and claimed will "collapse under heavy load." The quoted phrase related to an entirely *different* embodiment that was ruled new matter and never added to the '538 application.

The trial court relied primarily on the '869 patent as prior art against the '538 patent. It twice specifically and correctly refused to rely on the Orban reference. Dennison's brief relies, ineffectively and without reference to the district court's view, on elements it purports to find in Orban.

In a confused and confusing effort to shore up the obviousness conclusion of the district court, Dennison abandons much of what the court said. It then cites items in the record about

²⁶ Dennison's argument that the Examiner had not "appreciated the significance of this prior art" (though cited and applied by the Examiner) is a conjecture made even less palatable by Dennison's failure to explain any of the references (saying only that one has a "hinge," another has a "ledge", etc.).

which not a word was said at trial, and with no explanation as to how those items can be seen to suggest the claimed inventions in suit. *See Amstar Corp. v. Envirotech Corp.*, 730 F.2d 1476, 1486, 221 USPQ 649, 656-57 (Fed.Cir.1984).

Dennison's analysis here of the prior art relied upon by the district court as invalidating the '869 patent consists of two lines in which it says only that three prior patents "teach support." That useless characterization does not aid this court in analyzing the references as wholes, nor does it begin to explain how the cited references teach or suggest the claimed inventions. Similarly, Dennison points to an incomprehensible phrase ("flexibility pivotable ratchet buckle"), in the Fein reference, while ignoring Fein's full disclosure and the trial record, which establish that Fein's pawl is rigid and that its structure is entirely distinct from those claimed in the patents in suit.

Dennison intimates here that a cable tie found on sale was that of the Bourne patent, but Dennison's counsel admitted to the district court that "pictures in the on sale defense are of different cable ties." The district court stated that Dennison made no serious argument before it that the on sale product anticipated the claimed inventions in suit.

Dennison misleadingly says that the inventions of the '869 and '538 patents were made "simultaneously", referring to a stipulation that certain drawings established conception of the subject matter of the representative claims "as of" January 1968, which is an entirely different matter. Dennison knows the inventions were not made simultaneously, admitting at another point in its brief that the first sketch of the '869 structure was made a few weeks *after* the '538 structure was reduced to practice.

In a post-hearing letter, Dennison's counsel tells the court that an exhibit (PX-55) was "excluded from evidence at the trial". That is not true. The deposition testimony forming part of that exhibit, and the documentary exhibits referred to therein, were admitted into evidence. There was objection to

the argument portion of the exhibit. The district court accepted that portion as a trial brief and invited Dennison to respond. Dennison did not do so.

[25] In sum, Dennison's presentation on appeal is disingenuous, containing mischaracterizations, misleading statements, and improper submissions. It has unnecessarily burdened the court with extraordinary need to check the record in respect of each of its assertions, only to find in too many instances a lack of candor. Accordingly, Panduit is awarded double its costs on appeal. *Amstar Corp. v. Envirotech Corp.*, 730 F.2d at 1486, 221 USPQ at 656-57.

Conclusion

The judgment of the district court with respect to validity is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

REVERSED.

APPENDIX

The Claims in Suit

The '146 Patent

Claim 24 was stipulated as representative:

24. An integral one-piece cable tie to be tensioned about a bundle of wires and the like, said cable tie comprising an elongated flexible strap, a frame integral with one end of said strap and including an abutment wall, said frame having an entry surface and an exit surface and a strap-receiving opening extending there-through, a row of teeth disposed on one longitudinal surface of said strap and arranged transversely with respect thereto, a pawl hingedly mounted on and integral with said frame and extending into said strap-receiving opening toward said abutment wall, said abutment wall having a strap-bearing surface disposed toward said pawl and defining therewith a strap-receiving channel, and a set of teeth on said pawl arranged transversely with respect thereto and disposed toward said abutment wall and shaped complementary to said row of teeth on said strap, the crests of a plurality of the teeth in said set of teeth lying in a common surface space equidistantly from said strap-bearing surface in the tensioned condition, said strap being deformable into a loop encircling a bundle of wires with the other end of said strap extending into said strap-receiving channel and through the opening in said frame and therebeyond, said set of teeth being disposed toward said row of teeth as said strap is tightened about the bundle of wires to a tensioned condition, said set of teeth upon release of said tensioned strap moving into firm engagement with adjacent ones of said row of teeth, any force tending to withdraw said strap from within said strap-receiving channel in a strap-loosening direction serving to move said set of teeth including said plurality of teeth into more firm engagement with the engaged ones of said row of teeth firmly to wedge said strap between said strap-bearing surface and said pawl, whereby to prevent inadvertent withdrawal of said strap from said frame and thus to lock said strap in its tensioned condition about the bundle [sic] of wires.

The '869 Patent

Claim 10 was stipulated as representative:

10. An integral one-piece cable tie to be tensioned about a bundle of wires and the like, said cable tie comprising an elongated flexible strap, a row of abutments disposed on one longitudinal surface of said strap and arranged transversely with respect thereto, a frame integral with one end of said strap and including an end wall and an abutment wall and a pair of longitudinally extending and spaced-apart side walls interconnecting said end wall and said abutment wall, said frame having an entry surface and an exit and a strap-receiving opening extending therethrough, a ledge on said end wall extending between the interconnecting said side walls and extending longitudinally from said end wall toward said abutment wall, a pawl disposed within said frame in said strap-receiving opening and pivotally mounted on and integral with said ledge, said abutment wall having a strap-bearing surface disposed toward said pawl and defining therewith a strap-receiving throat, the longitudinal axis of said throat being disposed substantially normal to the longitudinal axis of said strap as molded, and a tooth on said pawl arranged transversely with respect thereto and disposed toward said abutment wall and shaped to engage said row of abutments on said strap, said strap being deformable into a loop encircling a bundle of wires with the free end of said strap extending into said strap-receiving throat and through the opening in said frame and therebeyond, said tooth being disposed toward said row of abutments as said strap is tensioned about and release [sic] said strap causing at least one of said abutments firmly to engage said tooth, any force tending to withdraw said strap from within said strap-receiving throat in a strap-loosening direction serving to move said tooth into more firm engagement with the engaged ones of said row of abutments firmly to grip said strap between said strap-bearing surface and said pawl, whereby to prevent inadvertent withdrawal of said strap from said frame and thus to lock said strap in its tensioned condition about the bundle of wires.

(c) The '538 Patent

Claims 1 and 6 were stipulated as representative:

1. An integral one-piece cable tie to be tensioned about a bundle of wires and the like, said cable tie comprising an elongated flexible strap, a row of abutments disposed on one longitudinal surface of said strap and arranged transversely with respect thereto, a frame integral with one end of said strap and including an end wall and an abutment wall, said frame having an entry surface and an exit surface and a strap-receiving opening extending therethrough, a ledge on said end wall extending longitudinally therefrom toward said abutment wall, a pawl disposed within said frame in said strap-receiving opening between said ledge and said exit surface, a hinge interconnecting said ledge and the end of said pawl disposed toward said entry surface, the longitudinal extent of said hinge being less than the longitudinal extent of said ledge at the junction therebetween, the longitudinal cross-sectional area of said hinge being less than the longitudinal cross-sectional area of said pawl at the junction therebetween, said pawl and said hinge cooperating so that said pawl is limited to substantially pivotal movement with respect to said frame about the connection to said ledge, said pawl in the as-molded position thereof and in all other positions thereof including the tensioned position thereof being disposed entirely within said frame between the entry and exit surfaces thereof, said abutment wall having a strap-bearing surface disposed toward said pawl and defining therewith a strap-receiving throat, and a tooth on said pawl arranged transversely with respect thereto and disposed toward said abutment wall and shaped to engage said row of abutments on said strap, said strap being deformable into a loop encircling a bundle of wires with the free end of said strap extending into said strap-receiving throat and through the opening in said frame and therebeyond, said tooth being disposed toward said row of abutments as said strap is tensioned about the bundle of wires to a tensioned condition, and release of said strap causing at least one of said abutments firmly to engage said tooth, any force tending to withdraw said strap from within said strap-receiving throat in a strap-loosening direction

serving to move said tooth into more firm engagement with the engaged ones of said row of abutments firmly to grasp said strap between said strap-bearing surface and said pawl, whereby to prevent inadvertent withdrawal of said strap from said frame and thus to lock said strap in its tensioned condition about the bundle of wires.

6. The integral one-piece cable tie set forth in claim 1, wherein the normal tensioned position of said pawl is substantially the as-molded position thereof.

IN THE
UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

PANDUIT CORPORATION,

Plaintiff,

vs.

DENNISON MANUFACTURING COMPANY,
Defendant.

No. 78 C 4973

Chicago, Illinois
November 8, 1984
2:45 p.m.

DECISION

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN F. GRADY

APPEARANCES:

For the plaintiff: MR. CHARLES F. PIGOTT, JR.
MR. CHARLES WENTZEL

For the defendant: MR. JAMES P. RYTHER
MR. THOMAS C. ELLIOTT, JR.
MR. THOMAS CURRY

[1616] THE COURT: Your arguments were very helpful to me, gentlemen. The level of advocacy in this case has been very high due in part to the competence of counsel and due in part to the fact that you concentrated on what was really in issue in the case and did not get bogged down in trivia or technicalities or irrelevancies as sometimes happens in litigation. So both sides are to be commended for the clarity and the force of their presentations.

I will give you my findings of fact and conclusions of law. This case has to be decided on the question of whether the

plaintiff's patents are invalid by reason of obviousness. The question of infringement is not contested.

The Court should first define the art involved and the level of ordinary skill in the art. The art that is involved here, of course, is the art of designing plastic cable ties. I find that the ordinary level of skill in that art is the skill possessed by a graduate engineer, probably a mechanical engineer, with a high degree of familiarity with plastics and plastic molding. The knowledge possessed by such a person was not simply the knowledge yielded by an inspection of prior patents and other public uses but, rather, engineering principles and knowledge of the properties of the plastic materials utilized [1617] in the cable ties.

There has been reference from time to time to "skilled workers," and one might get the impression that the degree of expertise involved is that of someone working on the production line at a machine such as a molder. That I find is not the degree of skill possessed by a person whose business is the designing as distinguished from the making of plastic cable ties. One would not ordinarily attempt to design a cable tie unless he or she were an engineer with a considerable background in the relevant technology.

Turning to the question of when the first of plaintiff's patents was reduced to practice, so that we can determine what is prior art in regard to that invention, I find that the '146 invention was reduced to practice in 1961, as the plaintiff claims it was.

[1618] I find the testimony of Mr. Caveney and Mr. Moody to be credible, and their testimony is corroborated to a very high degree by the affidavit of Mr. Porcelli.

The Moody drawing causes a problem, and it is not easy to explain why Mr. Moody would have drawn a cable tie with a pawl attached to such a narrow neck as the one he drew. I have no explanation for that. But it is the only fact which throws any

doubt upon the date of reduction to practice, and it simply is not enough to prevent me from concluding that 1961 was, in fact, the date of the reduction of the '146 patent to practice.

On the question of whether or not plaintiff forfeited any of its patents by delay in filing its patent applications, I find that there was no such forfeiture. It seems to me that in order for the question of forfeiture to be presented, there must be a showing of prejudice or reliance or some change of position on the part of other persons, and there has been no such showing here. Mere delay without more does not result in forfeiture, and all I see here is mere delay.

Now, we turn to the question of whether plaintiff's inventions were obvious. In addressing that question, it is, of course, important for the Court to bear in mind the various principles which counsel have discussed in their arguments here. It is not appropriate for the Court to engage in hindsight. Furthermore, it is not appropriate [1619] for the Court to pick and choose isolated elements from various prior art references and combine them so as to yield the invention in question when such combining would not have been an obvious thing to do at the time in question.

In considering the question of obviousness in this case, I have given special emphasis to the question of commercial success and the related failures by others and copying by Dennison. I am satisfied that in plaintiff's patents we see the best of the art at the times in question. The '146 patent was better than anything else that then existed and the second two patents, the '869 and '538 patents, were the best at the time.

In fact, plaintiff's commercial embodiment of the '538 patent appears to be the leader in the industry. As I have remarked at various times during the trial, the evidence is simply overwhelming that Dennison copied the '538 patent.

Now, this commercial success, the failure of others and the copying by Dennison argue strongly in favor of non-

obviousness. In addition, of course, plaintiff has the benefit of the rule that the presumption of validity of the patent can be overcome only by clear and convincing evidence.

It is with these caveats firmly in mind that I will now undertake an analysis of each of the patents.

We will start with the '146 patent. The [1620] closest prior art reference is Emery, but Emery had a problem. The strap of the cable tie protruded from the head when the cable tie was in tension, and this protruding strap caused difficulties in the various applications to which the tie was put.

[1621] For instance, it could be entangled in various kinds of machinery.

So it became desirable to address that problem. The more specific problem with the protruding strap was that the cable tie could become undone since there was only one tooth on the Emery tie. And any pulling of the protruding end of the strap could easily disengage that one tooth.

So the problem presented by Emery was the so called release problem. The one engaging tooth could be too easily disengaged by some casual entanglement of the protruding strap with a foreign object.

The solution to the release problem that is offered by the '146 patent is to engage more than one tooth on the pawl with more than one tooth on the strap.

The plaintiff claims that the '146 patent in Claim 1 adds three new elements to Emery, namely, plural teeth on the pawl, sequential engagement of those teeth with the teeth on the strap, and wedging of those engaged members against the abutting wall in such a manner that in tension the engagement becomes stronger.

I conclude that this is simply a description of one element, not three. The introduction of plural teeth is for the purpose of engaging more than one tooth on the pawl with more than one

tooth on the strap. Such [1622] an engagement is necessarily sequential when the strap is moving through the head, and the purpose of the engagement inside the head is to wedge the strap between the pawl and the abutting wall.

In short, it seems to me that one element has been broken down into three elements, and in so doing plaintiff is able to argue that it has more patentable differences over Emery than I find to be the case.

Now, if, of course, Emery does not teach the interlocking of the pawl and strap in such a manner that there is indeed a wedging against the abutting wall, then Plaintiff would be able to argue that wedging is not implicit in the decision to have more than one tooth in the first place.

Plaintiff points to Figure 2 of the Emery patent as evidence that Emery did not appreciate the desirability of wedging against the abutment wall. And Figure 2 does, indeed, show a substantial portion of the pawl and the engaged strap to be sticking out of the head and obviously not in contact with the abutting wall.

On the other hand, the text of the Emery patent makes abundantly clear that Emery's intention was to achieve wedging against the abutment wall. That can only be accomplished if the wedging is inside the head, because that is where the abutting wall is, inside the head.

[1623] Now, how do we account for the drawing? I can't account for that drawing any more than I can account for the Moody drawing. It's an aberration, it's an anomaly. And as I indicated a little earlier this afternoon, it is difficult to believe that someone whose only task was to make two drawings, could make a mistake on one of them when his business is making patent drawings. And yet, I adopt defendant's suggestion that what is represented by Figure 2 of Emery is a draftsman's error.

You can't read that patent with any knowledge whatever of the art involved and conclude that the lion's share of the

engagement of the strap and the pawl is supposed to take place outside the head.

I conclude, therefore, that Emery is specific prior art for wedging the strap between the pawl and the abutment wall inside the head, and doing it in a secure manner so that the strap won't come loose.

Now we are back where we started. It did tend to come loose because there was only one tooth. And the '146 solution to that was to add more teeth and put those teeth exactly where the intelligent reader of Emery would have known they should be, namely on the pawl, inside the head, gripping the strap against the abutment wall.

The engagement will necessarily be sequential; it can't take place any other way. And in order to achieve [1624] the parallel kind of relationship between the pawl and the abutment wall that will be necessary for effective wedging, it follows that the teeth of the pawl must be in a straight line and equidistant from the surface of the abutment wall.

[1625] Thus, Claim 24 of the '146 patent is necessarily implied in a decision to use multiple teeth for the purpose of more effective wedging.

Now, I believe that if there were no prior art reference whatever that showed multiple teeth, the use of multiple teeth was, nonetheless, obvious in light of the problem presented by Emery.

The problem was, there was only one tooth, and that could become disengaged.

Now, I have tried to talk myself out of the conclusion that the way you solve that is to use some additional teeth, and I have tried not to use hindsight, and I have resisted evidence that would not be clear and convincing, and I think I have done everything I am supposed to do to resist the conclusion that that solution is obvious. But I have been unsuccessful.

My conclusion is that with no prior art at all, the use of more teeth on the pawl to engage the strap inside the head in a sequential manner, necessarily sequential manner, so that if there is some yanking on the strap, you have got more than one tooth in the wedged position to resist that tugging, is obvious.

But the fact of the matter is that there is prior art demonstrating the use of multiple teeth, and that is Fein and Litwin.

[1626] I tend to agree with plaintiff, that there can be arguments made to the effect that Fein doesn't teach anything more than the use of multiple teeth, and that Litwin doesn't teach much more than that either.

But in my view, that is all that is necessary to be taught. And as I have indicated, I don't even think it is necessary for anybody to teach that in view of the fact that it was an obvious solution.

I find, therefore, that Claims 1 and 24 of the '146 patent would have been obvious to a person of ordinary skill in the art at the time of the claimed invention. And my finding in that regard is based upon what I believe is clear and convincing evidence, and that finding is that the combination is obvious—or was obvious.

I am well aware that you don't just simply address the question of whether the use of multiple teeth was obvious. You address the question of whether the whole combination was obvious. And that is what I find. I find that that combination was obvious.

I will now turn to the '869 patent.

The problem addressed by that patent was insufficient strength in compression. The position of the hinge on the pawl was such that the compressive strength was insufficient for most jobs that a cable tie would be called upon to perform. It had a tensile strength of only 20 pounds.

[1627] Now, the reason for this was that the cable tie was positioned in such a way that when in tension there was nothing under the hinge to absorb the compressive force. The hinge was essentially perpendicular to the axis of the strap.

The solution devised by Caveney for that problem was to change the orientation of the pawl to a more or less vertical position, so that it would be essentially parallel to the axis of the tensioned strap, and then to place a ledge under the pawl to absorb the compressive force.

A contemporaneous development was the Eberhardt patent, which referred to a ledge being provided so as to constitute a rigid base. The Japanese patent and the Litwin patent, which are prior art to the '869 patent, also showed structures analogous to the '869 ledge in that they absorbed compressive force, force exerted by the strap as it was tightened about the bundle.

As in the case of the introduction of an additional tooth or additional teeth in the '146 patent, the result achieved by introducing a ledge in the '869 patent was altogether expected. One of the tests for non-obviousness is whether there is an unexpected result. I do not mean to imply that there has to be an unexpected result, but, on the other hand, where the result of a rather ordinary step is exactly what you would expect and simply bears out the reason for your [1628] doing it in the first place, that is an argument for obviousness.

It seems to me, and I so find, that to increase the compressive strength of the cable tie, and specifically the pawl and hinge of the cable tie, you would set the pawl on a ledge.

Moreover, unless one were going to go out of his way to make the ledge a weak one, it is obvious that the ledge should be an integral part of the head of the tie. And extending the ledge from side wall to side wall is an obvious way to accomplish that.

I am unable to tell whether there is a ledge in Orban or not, and I give plaintiff the benefit of the doubt on that, which I think plaintiff is entitled to have.

So for purposes of my decision, I am assuming that there is no ledge in Orban. Or, put another way, I find that the person of ordinary skill in the art would not necessarily find a ledge in Orban either in the text or in the drawings. But I, nonetheless, find the '869 patent to be obvious both on general principles of physics and in light of the Japanese patent and the Litwin patent.

Now, the '869 patent had its own problems. The principal problem, I take it, was that the pawl was not sufficiently flexible. It was attached to the ledge and was found not to bend enough when the strap was introduced into the head [1629] channel and then tensioned.

What could happen and apparently did happen was that the teeth would tend to break off when contacted by the strap in what has been described, I believe, as a file-like action. The problem specifically was a rather rigid pawl. The rigidity of the pawl made the teeth vulnerable to filing. And, of course, if the teeth came off, you were back at the Emery problem of the strap becoming disengaged.

Now, if the problem is rigidity, the opposite of rigidity is flexibility. So it seems to me that the person of ordinary skill in the art, when recognizing the problem—and that, incidentally, would not have been difficult—there is testimony in the record that the problem was obvious, the problem itself was obvious—the teeth were being filed off—the person of ordinary skill in the art would necessarily think in terms of making the pawl more flexible than it was. The objective would be to achieve some way of enabling the pawl to get out of the way of the strap as it moved past so that the teeth would not be filed off.

How do you do that? Well, the way the '538 patent does it is by way of the so called discrete hinge.

[1630] And that is the essence of '538 patent, the discrete hinge.

A hinge is an elementary method of making something bend. I understand the difference between a so-called cantilever beam and a hinge. The cantilever beam would not be the solution here, but I think that the person of ordinary skill in the art would realize that.

The solution is a hinge because you want to do nothing to interfere with the multiple engagement of the teeth. So you want the pawl to get out of the way when it's desirable to get out of the way, but yet to come back when it's supposed to come back and end up in a position parallel to the abutment wall with its teeth equidistant from the abutment wall.

I know of no way to do that, and I don't think the evidence in the case indicates any way to do that, but by use of a hinge.

Now, there are numerous examples in the prior art of hinges and discrete hinges of the kind claimed in the '538 patent. The web in Emery is one example. Litwin has a hinge. Fein, if hinging is a matter of degree, has a hinge, and I refer to Column 2, Line 37 of Fein.

I am not going to say that Orban has a discrete hinge because I think that can be argued either way. And a great deal of time in the trial was spent in that argument, [1631] and I would not want to indicate that I am basing my decision on whether Orban does or does not have a discrete hinge.

A contemporaneous development that is pertinent is the Bourne patent that had a discrete hinge.

But returning to the prior art, perhaps the most relevant prior art and the one piece of prior art with the most far-reaching implications in this case is the '146 patent. There a discrete hinge was clearly shown.

The discrete hinge in the '538 patent is claimed in language that one would have to sit through this trial to understand is intended to be talking about a hinge. And because of that, it is possible for counsel to argue, as was done in the case of the '146 patent, that many elements are being claimed.

But just as in the '146 patent, I find that what was done in the '538 claim was to describe a number of necessary characteristics of the same element as though they were separate elements.

I find nothing in the '538 patent, or at least Claim 1 thereof, other than a discrete hinge, that is new over the '869 patent.

Now, Claim 6 of the '538 patent claims a pawl which is in the same position, in the tensioned position as it is in the as-molded position. That claim is contained, or shown, in Orban. Figure 2 of Orban shows the as-molded [1631] position, and Figure 4 shows the tensioned position, and they are identical. So there is nothing new in Claim 6.

I find each element and the combination of elements in the '538 patent to have been obvious to a person of ordinary skill in the art at the time of the claimed inventions.

[1633] Speaking generally, I think that plaintiff's approach to the case has been flawed by two errors. One is that a few claims have been multiplied into an apparent plurality of claims, or larger number of claims—or claim elements, I mean, by splitting what are essentially the same element into a number of parts.

I have illustrated what I mean by that in connection with the '146 patent. The sequential engagement and the parallelism and the equidistance are not three elements in addition to the plural teeth, but are inherent in the concept of plural teeth.

The second error that seems to me to affect the plaintiff's case is that there has been an over-dependence upon a claimed lack of specific prior art references and insufficient attention to what is taught by general engineering principles and general principles of physics and, indeed, the common experience of mankind. The idea that to support something, you put a platform under it, must be one of the oldest observations that man has made.

Now, I want to return to where I started and say that I think that Mr. Caveney and Mr. Moody and Panduit have designed and perfected an excellent and, indeed, preeminent commercial product. And the fact that they have done so contributed greatly to the difficulty of this case. It is not easy to find something obvious in the face of [1634] those facts. And I do so with great reluctance and great resistance. And, in fact, I have been going back and forth on this thing in my mind throughout the trial.

It give me great comfort to know that I am just the first stop on this trip. Everything I have said here can be analyzed just as well by the Court of Appeals for the Federal Circuit.

All the documents are here, the testimony is there for them to read, and if they come to a different conclusion than I, so be it.

This is a case in which the credibility of the witnesses has really played a very small part. It is primarily, it seems to me, a matter of applying your experience to the undisputed facts. It's a matter of interpretation. What do these things teach? What would they teach a person of ordinary skill in the art?

Now, in conclusion I would like to make findings on some miscellaneous questions.

I find that the Alex exhibits were the exhibits that were involved in the public use proceeding. There is no question about that in my mind.

Panduit was, or should have been in a position to gainsay that if it had not been true. And so you have what I find to be very convincing circumstantial evidence that stands absolutely un rebutted.

[1635] So the Alex exhibits, the cable ties and the charts and the drawings and other documents, are the ones that were involved in the public use proceeding.

Now, the significance of that does not appear to me to be great. The defendant has made no serious argument that that product that was on sale anticipates any of the patents in question, and there is no evidence that persuades me that they did anticipate the patents in question. So I am not sure just what importance that question has in the case.

I further find that the plaintiff presented confusing claims to the Patent Office over a long series of patent applications for various cable ties, and that to some extent its arguments were inconsistent and self-contradictory.

[1636] It may well be that if I am right here and the examiner was wrong, the reason for his error was that he was inundated with a great deal of material which confused him.

Turning to the question of double patenting as between the '869 patent and the '538 patent, I find that there is double patenting. The reason for that is that the discrete hinge in the '538 patent is not a patentable difference over the '869 patent. It was obvious in the light of the '146 patent and the other considerations I have mentioned.

I further find on another question that I have already covered, but I will make a specific finding on it, that Dennison did copy the Panduit patents. If there were any doubts on that, it would have been dispelled by Dennison's failure to bring to court the people who could have denied that, if it were possible to deny it. Instead Dennison brought people who had second-hand and relatively remote connection with the accused devices and I found their testimony to be of very little assistance.

On the question of infringement, I find that the accused devices would infringe the patents in suit if those patents were valid, but because those patents are not valid, the defendant cannot be found guilty of infringement.

Finally, because I believe the defendant is claiming attorney's fees in this case, I will make a ruling on that now. I find that this is not an exceptional case [1637] within the

meaning of the statute. I do not regard plaintiff's claims to be frivolous or brought in bad faith. I think there is room for some difference of opinion here based largely upon those secondary considerations that have given me such trouble in the case: failure by others, copying by Dennison, and unquestioned commercial success of the plaintiff.

While I have found the issues in favor of the defendant, I do not believe that this is an appropriate case for the imposition of fees and, therefore, deny that prayer of the defendant.

For these reasons, I find the issues in favor of the defendant and against the plaintiff and enter judgment that the patents in suit are invalid by reason of obviousness.

Now, those are my findings of fact and conclusions of law. If you wish to prepare a judgment order that will contain any additional findings that are routine and should be included, you may do so and attach a transcript of my remarks to that judgment order, and that will constitute the order of the Court.

Does anybody have any additional suggestions?

MR. RYTHUR: Do I have any particular time, your Honor?

THE COURT: No. I would expect you to confer on [1638] the form of it, —

MR. RYTHUR: Fine.

THE COURT: —and work it out in a manner that is agreeable to you.

(Which were all the proceedings had on the above entitled cause on the day and date aforesaid.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PANDUIT CORP.,

Plaintiff,

v.

DENNISON MANUFACTURING
COMPANY,

Defendant.

Civil Action No. 78 C 4973
Hon. John F. Grady

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND JUDGMENT ORDER

The primary findings and conclusions were made by the court on November 8, 1984 at the conclusion of the trial, and a transcript thereof is attached. The following comprise supplemental findings and conclusions adopted upon further consideration of the matters tried.

I. SUPPLEMENTAL FINDINGS OF FACT

1) This is an action for infringement of U.S. Patent No. 3,537,146 (hereinafter the '146 patent), of U.S. Patent No. 3,660,869 (hereinafter the '869 patent), and of U.S. Patent No. 3,965,538 (hereinafter the '538 patent). Plaintiff is the owner of the three patents.

2) The court has jurisdiction of the parties and the subject matter, and venue is proper in this court.

3) The issues raised by the pleadings and tried to the court are:

a. whether Claims 1-4, 7, 10, 12, 14-22 and 24-27 of the '146 patent; Claims 1, 10 and 12 of the '869 patent; and

Claims 1, 2, 5, 6, 11, 17 and 21 of the '538 patent are valid; and, if so,

b. whether these claims have been infringed by defendant.

4) By stipulation, Claims 1 and 24 of the '146 patent, Claim 10 of the '869 patent and Claim 6 of the '538 patent, are representative claims of the respective patents, and a resolution of the issues with respect to a representative claim of a patent is a resolution with respect to all asserted claims of that patent.

5) Plaintiff's trial exhibits 16 and 17 illustrate the accused structures, and defendant does not dispute that the representative claims of the '146 and '869 patents, as interpreted by the plaintiff, would be infringed by the structure of plaintiff's trial exhibit 17, and that the representative claims of the '146, '869 and '538 patents, as interpreted by the plaintiff, would be infringed by the structure of plaintiff's trial exhibit 16. Defendant correctly contends, however, that the same interpretation must be given to the claims when comparing them with the prior art.

6) Plaintiff's trial exhibits 46, 47 and 60 represent the commercial products of plaintiff in the time period indicated thereon. These products are the "commercial product" referred to on page 1633 of the attached transcript.

7) The "Alex" exhibits referred to on page 1634 of the attached transcript consist of the photographs marked as defendant's trial exhibits 81A, 82A, 83A, 84A through F, inclusive, 85A, and 86A through C, inclusive. The "public use proceeding" referred to is the proceeding identified in defendant's trial exhibit 28. These exhibits have been considered only as evidence of contemporaneous developments by Bowthorpe-Hellerman, as stipulated by the parties. It is understood that the developments are prior art to the '869 and '538 patents if on sale more than one year prior to the

respective filing dates, however, that fact is not a basis of the decision of patent invalidity.

8) The "series of applications" referred to on page 1635 of the attached transcript comprise those applications identified in defendant's trial exhibit 60.

9) In the analysis of the question of double patenting referred to on page 1636 of the attached transcript, representative Claim 6 of the '538 patent was considered in light of representative Claim 10 of the '869 patent. The primary prior art teachings relied on are found in Orban and in the '146 patent.

10) With respect to the '538 patent, the prior art considered comprised Emery (U.S. Patent No. 3,127,648, DX 10a) the Japanese patent (DX 11b), Litwin (U.S. Patent No. 3,214,808, DX 10d), Fein (U.S. Patent No. 3,009,220, DX 10e) and the '146 patent. The teachings of Bourne (U.S. Patent No. 3,486,201, DX 10g) were considered only for purposes of showing the state of contemporaneous developments in the art.

II. SUPPLEMENTAL CONCLUSIONS OF LAW

1) This Court has jurisdiction of the subject matter and of the parties herein; and venue is proper in this Court. 28 U.S.C., §§1338 and 1400; 35 U.S.C., §281.

2) Claims 1-4, 7, 10, 12, 14-22 and 24-27 of plaintiff's U.S. Patent No. 3,537,146 are invalid and void because the subject matter thereof would have been obvious at the time of the invention to one of ordinary skill in the art. 35 U.S.C., §103.

3) Claims 1, 10 and 12 of plaintiff's U.S. Patent No. 3,660,869 are invalid and void because the subject matter thereof would have been obvious at the time of the invention to one of ordinary skill in the art. 35 U.S.C., §103.

4) Claims 1, 2, 5, 6, 11, 17 and 21 of plaintiff's U.S. Patent No. 3,965,538 are invalid and void because the subject matter thereof would have been obvious at the time of the invention to one of ordinary skill in the art. 35 U.S.C., § 103.

5) Claims 1, 2, 5, 6, 11, 17, and 21 of plaintiff's Patent No. 3,965,538 are invalid and void on the grounds of double patenting. 35 U.S.C., § 101.

6) Since all of plaintiff's asserted claims are invalid, defendant has not infringed any of plaintiff's patents.

7) This is not an exceptional case which would give rise to an award of attorneys' fees, and the court declines to exercise discretion to make such an award. 35 U.S.C., § 285.

III. JUDGMENT ORDER

ORDERED that judgment be entered as of the date set forth below (with plaintiff's time for appeal running therefrom) in favor of defendant. Defendant shall recover its costs in this action.

United States District Judge

Date

Approved as to form only:
PANDUIT CORPORATION

BY:
One Of Its Attorneys

Approved as to form and content:
DENNISON MANUFACTURING COMPANY

BY:
One Of Its Attorneys

IN THE
UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

PANDUIT CORPORATION,

Plaintiff,

vs.

DENNISON MANUFACTURING
COMPANY,

Defendant.

Docket No. 78 C 4973

Chicago, Illinois
November 30, 1984
2:25 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN F. GRADY

* * * * *

THE COURT: I was talking in a progressive kind of way as I went along from patent to patent.

Now, I will put that in, but what about the rest of these items? Are they really essential?

MR. RYTHER: Well, your Honor, no. I would have to say no, it is not essential. If it were clear with respect to paragraphs two and three that the prior art you considered with respect to the '869 patent was also considered with respect to the '538, I think that would resolve this.

THE COURT: Well, that is true. I mean, I considered both of those patents in relation to all of the prior art that applied to both of them.

* * * * *

OPPOSITION BRIEF

FEB 5 1986

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

DENNISON MANUFACTURING COMPANY,

Petitioner,

vs.

PANDUIT CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 28.1 STATEMENT

Respondent, Panduit Corp., has no parent companies or subsidiaries apart from wholly-owned subsidiaries or affiliates.

IN THE

Supreme Court of the United States

DENNISON MANUFACTURING COMPANY,
Petitioner,

vs.

PANDUIT CORP.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR RESPONDENT

I. INTRODUCTION

This suit between two corporations is for infringement of three Panduit patents. There are a total of 28 claims at issue from the three patents, and Dennison has admitted infringement of all three patents and of every one of the 28 claims. The following facts were found by the trial court and relied upon by the Court of Appeals for the Federal Circuit.

Jack E. Caveney founded Panduit in the basement of his home in 1955, making a plastic wiring duct. In 1961, he began a research program to develop a one-piece plastic cable tie. That program lasted nine years and cost several million dollars. The result of that program was the three patents in suit. The commercial embodiment of those three patents was first sold by

Panduit in October 1970, and by 1984 the patented one-piece cable tie accounted for \$50 million in annual sales, one-half of Panduit's total sales, and over one-half the total profits of Panduit.

Beginning in 1968, Dennison put its staff of engineers and designers to work on a one-piece cable tie development program. It carried on that program at considerable expense for ten years, developing many ties and patenting some. None was successful. Having failed to succeed for over ten years with ties of its own design, Dennison achieved great success in 1978 by making a close copy from two of Panduit's patents shortly after they issued. As a result of its copying, Dennison became the second or third largest supplier of one-piece cable ties.

Among the many findings of the trial court as to the great success of Panduit's commercial embodiment of the patents in suit, and the close copying from those patents by Dennison, is the following:

"Plaintiff's commercial embodiment of the '538 patent appears to be the leader in the industry. As I have remarked at various times during the trial, the evidence is simply overwhelming that Dennison copied the '538 patent".

The Federal Circuit wrote a 47-page opinion, and approximately one-third of the opinion is devoted to an analysis of dozens of errors of law committed by the trial court both in its evaluation of the individual prior art patents and in its combining of those patents by using hindsight and with no teaching to combine them other than the patents in suit. The errors of law committed by the trial court are too numerous to discuss, but a reading of the detailed 47-page opinion by the Court of Appeals leaves no room for doubt that it would not be possible

to reverse that decision without reversing the major patent decisions by this Court including *Graham v. John Deere Co.*, 383 U.S. 1 (1965).

Because Dennison is faced with a ruling that it has infringed 28 valid claims from three different Panduit patents, it is understandably hard pressed to concoct reasons why the United States Supreme Court should review the entire judgment by the Court of Appeals as to all 28 claims in all three patents. While numerous attempts are made to reargue the entire case, Dennison has advanced two principal grounds in its petition that a writ of certiorari be issued.

With respect to two of the patents in suit, the Caveney et al. '869 patent and the Caveney et al. '538 patent, Dennison has contended that the decision by the Court of Appeals for the Federal Circuit conflicts with a 1974 decision by the Court of Appeals for the Seventh Circuit. That contention is easily disposed of for several reasons, including the fact that the Court of Appeals for the Seventh Circuit no longer has jurisdiction to review patent cases. In fact, one of the reasons for creation of the Court of Appeals for the Federal Circuit was to provide uniformity in patent decisions. Beyond that, the basis for suggesting that a conflict exists in the first place is preposterous.

As for the third patent in suit, the Caveney '146 patent, Dennison has advanced as a ground for issuance of a writ of certiorari the argument that the Court of Appeals for the Federal Circuit violated Rule 52(a) of the Federal Rules of Civil Procedure by refusing to accept a so-called critical fact finding as to a prior art Emery patent upon which Dennison relied in its attempt to invalidate the '146 patent. However, the record plainly shows that the trial court made several inconsistent fact findings with respect to the Emery patent, and in fact the trial court was so uncertain as to the law governing the manner of determining what the Emery patent and other prior art taught that it expressly requested review by the Court of Appeals on the point.

II. THERE IS NO CONFLICT BETWEEN THE FEDERAL CIRCUIT AND THE SEVENTH CIRCUIT

Dennison knows that historically a conflict between the decisions of two or more United States Courts of Appeals has frequently been a ground upon which a writ of certiorari has been granted. Accordingly, in a lame attempt to fit that mold, and being unable to conceive of any other reason why the U.S. Supreme Court could possibly be interested in reviewing the judgment below as to the ten claims at issue in the '869 patent and the '538 patent, Dennison has resurrected a 1974 opinion from the Seventh Circuit where the Court of Appeals in a one-page opinion held that Eberhardt U.S. Patent 3,484,905 was invalid.

Dennison asserts the 1974 Seventh Circuit case is relevant because the Eberhardt patent was on a cable tie. Dennison is suggesting that because a cable tie patent was held invalid in *All States Plastic Mfg. Co. v. Weckesser Company*, 506 F.2d 465 (7th Cir. 1974), and since two totally different patents on cable ties were held not to be invalid in the instant case, there is a conflict. Dennison makes the bizarre suggestion that the U.S. Supreme Court should rule once and for all whether a patent claiming an invention in a plastic cable tie is valid or invalid, without regard to the claims at issue or the prior art. Dennison has not explained how such a proposition can be reconciled with the procedures laid down in *Graham v. John Deere Co.*, 383 U.S. 1 (1965), for determining patent validity.

In fact, the Caveney et al. '869 patent and the Caveney et al. '538 patent are entitled to an earlier date of invention than the Eberhardt '905 patent. As a result, the prior art in the 1974 case involving the Eberhardt '905 patent is *substantially* more extensive than the prior art available to Dennison in the instant case.

The test applied in the *Graham v. John Deere* case requires that the trial court determine the "differences between the prior art and the claims at issue". This is a further reason why the

two cases are unrelated. The Eberhardt '905 invention is so different from the inventions claimed in the Caveney et al. '869 and '538 patents that the trial court in the instant case found that they teach opposite things.

Specifically, in the Seventh Circuit case the patentee Eberhardt claimed a pawl which was substantially rigid so that it would *not* pivot at or near its base. In contrast, every one of the ten claims at issue in the Caveney et al. '869 and '538 patents emphasizes that the pawl must be hingedly mounted so that it *will* pivot at or near its base. Thus, the Court of Appeals for the Seventh Circuit stated as follows concerning the Eberhardt '905 invention:

"It is contended that this combination provides needed rigidity to avoid slippage caused by partial pivoting of the pawl at or near its base . . ."

Recognizing that each of the claims at issue in the Caveney et al. '869 and '538 patents claims a combination totally different from Eberhardt, so as to provide for pivoting of the pawl rather than rigidity during insertion, the trial court in the instant case stated as follows in comparing the Eberhardt invention and the Caveney inventions:

"It sounds like they (Eberhardt '905) are claiming the exact opposite kind of virtue from what is claimed in plaintiff's (Caveney) patent . . ." (bracketed matter added)

In a desperate attempt to show *something* in common between the Eberhardt '905 patent and the Caveney et al. '869 and '538 patents, Dennison made the irrelevant discovery that in all three patents the claimed invention includes a "ledge". Dennison admitted throughout the trial that the claims of the '538 patent set forth at least eight features in combination, so the fact that one of those features is a "ledge", and the Eberhardt cable tie also happens to include a "ledge", hardly establishes that the claimed Caveney invention, when viewed

"as a whole" as required by 35 U.S.C. 103, is the same as the Eberhardt invention. The Court of Appeals repeatedly criticized Dennison throughout its 47-page opinion for just such superficial treatment of the prior art and the claimed inventions. The Court stated:

"On appeal, Dennison proffers only superficial characterizations of the claimed inventions and the references, as it did before the district court. At no point does Dennison treat any claimed invention or any reference as a whole. The meaningless one-word descriptions of the claimed inventions and reference structures in Dennison's brief are of no use or assistance to this court".

The petition of Dennison for review of the judgment below as to the '869 and '538 patents is so preposterous that they would have the U.S. Supreme Court rule for all time on whether a patent claim, if it includes a "ledge" as one element of the combination, is valid or invalid. Dennison fails to explain how such a position can be reconciled with the *Graham v. John Deere* decision, supra, which requires that in each case the trial court consider "the scope and content of the prior art" *in that case* and "the differences between the prior art and the claims at issue" *in that case*. Indeed, the statute, 35 U.S.C. 103, requires that the trial court consider the claimed "subject matter as a whole".

It is thus respectfully submitted that the one-page decision by the Court of Appeals for the Seventh Circuit in 1974 does not conflict with the 47-page decision by the Court of Appeals for the Federal Circuit in 1985. Moreover, since the Court of Appeals for the Seventh Circuit no longer has jurisdiction to review patent cases, and such jurisdiction rests exclusively with the Court of Appeals for the Federal Circuit, there is no conflict between circuits.

III. THERE IS NO MISAPPLICATION OF RULE 52(a)

Dennison argues an alleged misapplication of the "clearly erroneous" standard of Rule 52(a) by the Court of Appeals.

However, the Court of Appeals opinion is clearly based upon errors of law by the trial court.

Indeed there is an entire section in the 47-page Court of Appeals opinion entitled "Misevaluation of the Prior Art" which deals with the errors of law committed by the trial court in evaluating the prior art patents. The Court of Appeals noted the "well established rule of law is that each prior art reference must be evaluated as a whole". Instead, the Court of Appeals found that the trial court misevaluated the Emery and other prior arts patents as follows:

"Three fundamental errors resulted from a disregard of the decisional parameters governing the proper evaluation of prior art. The first, as above indicated, was the picking and choosing of 'teeth', 'ledges', and 'hinges' either absent from the prior art references or there disclosed in entirely distinct form, characteristics, and relationships." (appendix 22a)

Dennison on page 5 of its petition quotes the following statement by the trial court, but leaves out the portion in italics:

"I conclude, therefore, that Emery is specific prior art for wedging the strap between the pawl and the abutment wall inside the head, and doing it in a secure manner so that the strap won't come loose. *Now we are back where we started. It did tend to come loose because there was only one tooth.*"

The trial court and Dennison's counsel repeatedly commented on the serious problems with the cable tie design shown in Emery, and they both recognized that the Emery design would not work well and had to be reconstructed by adding and rearranging various elements if there was to be any secure holding of the strap in the head of the cable tie. As the trial court observed in considering the prior art with respect to the Caveney '146 patent:

"The closest prior art reference is Emery, but Emery had a problem. The strap of the cable tie protruded from the head when the cable tie was in tension, and this

protruding strap caused difficulties in the various applications to which the tie was put.

The more specific problem with the protruding strap was that the cable tie could become undone since there was only one tooth on the Emery tie and any pulling of the protruding end of the strap could easily disengage that one tooth.

So the problem presented by Emery was the so-called release problem. The one engaging tooth could be too easily disengaged by some casual entanglement of the protruding strap with a foreign object."

Dennison's counsel readily admitted at the trial and to the Court of Appeals that the Emery design was no good unless it was reconstructed to solve its serious problems. As Dennison stated in its brief to the Court of Appeals:

"... If the Emery strap were cut off flush with the outer surface of the frame, the chisel edge of the pawl would be gripping only a small portion of the strap increasing the possibility of inadvertent release. The undesirable alternative was to leave a portion of the strap projecting from the head".

The Court of Appeals further found that the trial court committed a serious error of law in the manner in which it evaluated the teachings of the individual prior art patents. As the Court of Appeals noted:

"The court did not, as the statute requires, view the prior art from the perspective of one skilled in the art and uninformed by that testimony" (the testimony by the inventor Jack Caveney over a period of several trial days) (bracketed matter added).¹

¹ The Court of Appeals further found that the trial court erred in interpreting the prior art in the following manner:

"And it was a refusal to consider 'how things work' that caused the court to cite isolated minutiae from various references while ignoring critically important structural *distinctions* that significantly affect the different achievements of which the references and the claimed structures are capable."

In addition, the Court of Appeals found it was a fatal error of law for the trial court to combine the Emery patent with Fein or Litwin, because there was nothing whatever to suggest such a combination except for the Caveney '146 patent in suit.

The trial court never held the Caveney '146 patent invalid over Emery. Instead, the court held it was invalid over the "problems" of Emery on the theory that these various problems could readily be solved. The trial court held that the '146 patent was "obvious in light of the problem presented by Emery". The court meant that it considered Emery's problems and their solution obvious. However, the Court of Appeals ruled as follows:

"The court made specific technical and legal errors in evaluating the individual prior art patents, none of which was even close to the claimed inventions. The court made a basic error under the influence of hindsight when it found in the prior art 'problems' which were not extant in that prior art, but which were problems inventor Caveney had seen and solved and told the court about".

Apart from the multiple errors the trial court made with respect to the Emery patent itself, the trial court made it clear that no prior art patent alone was close to the Caveney inventions. The trial court clearly stated:

"Obviously no previous patent showed the combination at issue here. I'm not persuaded that this invention is similar to any one piece of prior art. Clearly we have a combination that is at issue here, and the issue is whether it was obvious to make the combination."

However, with respect to the trial court's combining Emery with Fein and Litwin to correct the "problems" with Emery, the Court of Appeals held that making such a combination was error.

"Nowhere did the district court indicate where in the prior art there might be a suggestion for combining teachings of the individual references, or how, if there were such a

suggestion, such a combination would equal any of those claimed in the patents in suit. There was here simply nothing in the prior art to rebut the presumption of validity to which the patents in suit are statutorily entitled."

If it were needed, the Court of Appeals also found that the manner in which the trial court substituted the DX 79 reconstruction of Emery prepared by Dennison's counsel for the real Emery patent using total hindsight was clearly erroneous and "plain error". The Court of Appeals held:

"The misevaluation applied here was of such a nature as to destroy any patent. It was plain error."

IV. DENNISON'S ARGUMENT CONCERNING "THE DIFFERENCES" IS WITHOUT MERIT

As is typical of Dennison's presentation on other issues, it seeks to confuse the Court by deliberately misinterpreting the statute, 35 U.S.C. 103, and the Supreme Court decision in the *Graham v. John Deere* case. The pertinent section of the statute reads as follows:

"A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the *subject matter as a whole* would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains." (emphasis added).

The statute requires that the trial judge consider "the differences" between "the subject matter sought to be patented" and the "prior art". The term "subject matter sought to be patented" is of course the claimed invention, which the Court in the *Graham v. Deere* case termed "the claims at issue". However, once those "differences" are ascertained, the statute dictates that in determining the legal question of obviousness, the subject matter sought to be patented, i.e., the claims at issue, must be considered "as a whole".

The words "as a whole" are critical. Thus, when a trial court is considering the legal question of obviousness, it is required by the statute to consider the claims at issue "as a whole", and not some individual element it might erroneously conclude to be the "essence" of the invention.

In its 47-page opinion, the Court of Appeals explained how the trial court was led by Dennison's counsel to violate the requirement of the above statute by reducing each of the patents in suit to its so-called "essence", i.e., a "ledge" or a "hinge", when considering the ultimate legal question of obviousness. The Court of Appeals held that approach was error because the statute requires that the claimed invention be considered "as a whole" when determining whether or not the invention is obvious.

Dennison's attempt to confuse the Court in its petition by unduly focusing on the word "differences" in the statute and in the *Graham v. Deere* opinion is regrettably all too typical of its arguments throughout its petition. As the Court of Appeals correctly observed in noting the errors by the trial court in reducing each of the three patents to its so-called "essence":

"The district court here lost sight of the fundamental rule that 'it is the claims that measure the invention'" *Aro Mfg. Co. Inc. v. Convertible Top Replacement Co., Inc.*, 365 U.S. 336, 339, 128 USPQ 354, 356-57 (1961); *Bandag, Inc. v. Al Bolser's Tire Stores, Inc.*, 750 F.2d 903, 922, 223 USPQ 982, 996 (Fed. Cir. 1984); *Jones v. Hardy*, 727 F.2d 1524, 1528, 220 USPQ 1021, 1022 (Fed. Cir. 1984).

V. DENNISON'S MISREPRESENTATIONS

It is recognized that this brief is not the place to review the numerous misrepresentations which Dennison made both to the trial court and the Court of Appeals in the instant case. The misrepresentations made to the trial court are discussed throughout the 47-page opinion by the Court of Appeals, and a sampling of the misrepresentations made to the Court of

Appeals are discussed in the last three pages of the Court of Appeals decision in a section entitled "Dennison's Presentation on Appeal". The Court of Appeals as a result awarded Panduit "double its costs on appeal". However, Panduit feels that a few words on the foregoing subject are in order, because in its petition (p. 14, f.n.3) Dennison not only denies its own misrepresentations, but goes further and attacks the Court of Appeals for "publicly indicting Dennison's counsel".

We will take but a single example to make the point which we feel should be made. The Caveney et al. '538 patent describes repeatedly a pawl which is hingedly mounted on a hinge which when in compression is "rigid non-collapsible". The hinge is never described in any other way except as "rigid non-collapsible". However, during the prosecution of the '538 patent before the U.S. Patent and Trademark Office, Panduit attempted to add to the patent application a new and different embodiment where the hinge could in fact collapse.

The patent examiner refused to permit the new embodiment to be added because it was totally different from the invention described in the patent application as filed and thus constituted objectionable "new matter".

The Board of Appeals affirmed the decision by the Examiner, and that was the end of the matter. The new embodiment where the hinge could collapse was never added to the patent application.

In an attempt to confuse the Court of Appeals with respect to the '538 patent, Dennison contended in its brief:

"... there is collapse under heavy load".

The foregoing was a serious misrepresentation, because in every instance the patent specifies that the hinge when loaded in compression is "rigid non-collapsible". The Court of Appeals recognized the contention by Dennison was false, noting as follows:

"The quoted phrase related to an entirely different embodiment that was ruled new matter and never added to the '538 application."

Dennison now retaliates against the Court of Appeals in a long footnote on page 14 of its petition contending there was an "unfortunate error by the Federal Circuit" and vehemently denying that the embodiment having a collapsible hinge was a "different embodiment". Dennison contends that the Court of Appeals "compounded its error by publicly indicting Dennison's counsel".

There was a time early in the trial when Dennison felt less desperate and was more candid about the facts. At an early stage of the trial, Dennison not only admitted that the collapsible hinge was a different embodiment and was never added to the '538 patent, but their counsel even sought and obtained an admission of that fact from Panduit's counsel. In the following quotation from the trial record, Dennison's counsel was Mr. Ryther, Panduit's counsel was Mr. Pigott, and Mr. Caveney was the inventor of the '538 patent:

MR. CAVENEY: The specification clearly says non-collapsible.

MR. RYTHUR: I agree with you on that.

MR. RYTHUR: And perhaps Mr. Pigott would just agree that this attempt to amend the application was not permitted by the Patent Office. The issue went to the Board of Appeals, and the Board of Appeals agreed with the Examiner, and you weren't able to get this feature (the collapsible hinge) into the '538 patent." (bracketed matter added).

MR. PIGOTT: That's true.

THE COURT: This was not an attempt to substitute but to add.

MR. PIGOTT: To add another embodiment where under extraordinary loads, it could collapse. And they wouldn't permit it to be added because it was completely at odds with what was already disclosed.

* * * * *

MR. RYTHER: Well with that extensive affirmative statement by Mr. Pigott, I'll go on.

The foregoing is believed appropriate to show by at least one example that Dennison's attempt to retaliate for the so-called indictment of its counsel by the Court of Appeals is simply further evidence of why the Court of Appeals found it necessary to devote three pages of its opinion to Dennison's misrepresentations in the first place. The foregoing further affords insight as to why the Court of Appeals felt compelled to hold:

"Dennison's presentation on appeal is disingenuous, containing mischaracterizations, misleading statements, and improper submissions."

CONCLUSION

The trial court closed its opinion with the following statement directed to the Court of Appeals for the Federal Circuit:

"I have been going back and forth on this thing in my mind throughout the trial. It gives me great comfort to know that I am just the first stop on this trip. Everything I have said here can be analyzed just as well by the Court of Appeals for the Federal Circuit. All the documents are here, the testimony is there for them to read, and if they come to a different conclusion than I, so be it. This is a case in which the credibility of the witnesses has really played a very small part. It is primarily it seems to me a matter of applying your experience to the undisputed facts. It is a matter of interpretation. What do these things teach? What would they teach a person of ordinary skill in the art?"

The Court of Appeals, in its 47-page decision, clearly applied the standards of patentability that were established by this Court in the *Graham v. John Deere* case. There is no reason for review of that decision and the Petition for Certiorari should therefore be denied.

Respectfully submitted,

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REPLY BRIEF

FEB 20 1986

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

DENNISON MANUFACTURING COMPANY,

Petitioner,

vs.

PANDUIT CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

DENNISON MANUFACTURING COMPANY,*Petitioner,*

vs.

PANDUIT CORP.,*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

INTRODUCTION

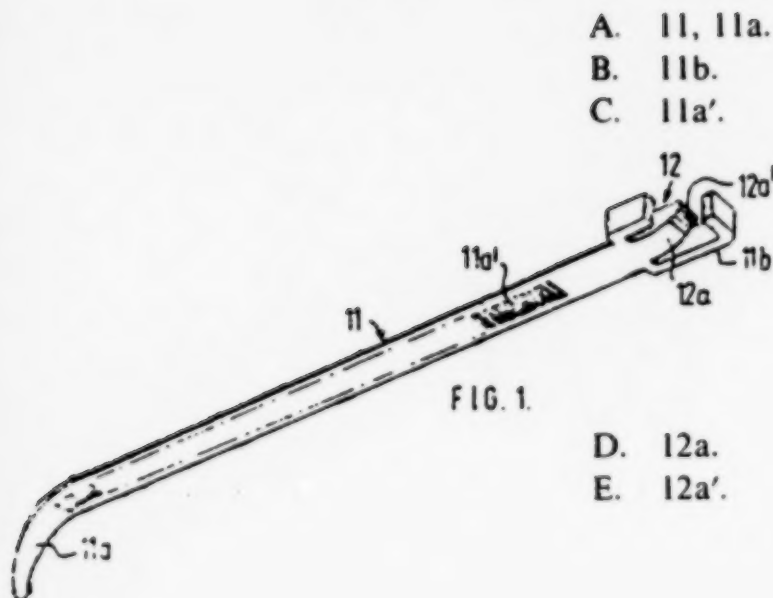
Panduit does not even attempt to dispute Dennison's contention that the Federal Circuit substituted its own fact findings for those of the trial court. Panduit suggests, instead, that this failure to follow Rule 52(a) wasn't really important in the final analysis, and that, in other words, the Federal Circuit would have reached the same conclusion even if it hadn't made new findings of fact. But the contrary is true; the Federal Circuit could not have reversed the trial court without first adopting its own version of the facts.

I. THE FEDERAL CIRCUIT'S IMPROPER FACT FINDING REGARDING EMERY FORMED THE BASIS FOR ITS CONCLUSION THAT THE '146 PATENT IS VALID

Panduit does not dispute Dennison's contention that the Federal Circuit ignored Rule 52(a) when it adopted an interpretation of the Emery prior art patent different than the interpretation of the trial court. Indeed, Panduit completely ignores the inconsistency between Figures 1 and 2 of the Emery disclosure, and concentrates instead on its version of the reasons why the Federal Circuit found the '146 patent valid over Emery. (PB 6-10.)¹ What Panduit fails to consider is that *those reasons are based on the Federal Circuit's unauthorized interpretation of the Emery disclosure.*

In fact, if the trial court's fact finding regarding Emery had been accepted, as it should have been, the Federal Circuit could not have reversed the trial court's conclusion that the '146 patent was invalid. This is illustrated most dramatically by the following comparison of the Emery cable tie with Claim 26 of the '146 patent, this claim being one of the 28 claims asserted by Panduit:

¹ Panduit responding brief, pages 6-10. References to Dennison's petition are, e.g. "(DP 4)", and references to the petition appendix are, e.g.: "(A 17a)".



A. 11, 11a.

B. 11b.

C. 11a'.

D. 12a.

E. 12a'.

- A. 26. An integral one-piece cable tie to be tensioned about a bundle of wires and the like, said cable tie comprising an elongated flexible strap,
- B. a frame integral with one end of said strap and including an abutment wall, said frame having an entry surface and an exit surface and a strap-receiving opening extending therethrough,
- C. a row of teeth disposed on one longitudinal surface of said strap and arranged transversely with respect thereto,
- D. a pawl hingedly mounted on and integral with said frame and extending into said strap-receiving opening toward said abutment wall, said abutment wall having a strap-bearing surface disposed toward said pawl and defining therewith a strap-receiving channel, and
- E. a tooth on said pawl arranged transversely with respect thereto and disposed toward said abutment wall and shaped complementary to said row of teeth on said strap, said strap being deformable into a loop encircling a bundle of wires with the other end of said strap extending into said strap-receiving channel and through the opening in said frame and therebeyond, said tooth being disposed toward said row of teeth as said strap is tightened about the bundle of wires to a tensioned condition, said tooth in the final tensioned condition being disposed opposite the strap-bearing surface only and wedging the engaged portion of said strap against said strap-bearing surface only, any force tending to withdraw said strap from within said strap-receiving channel in a strap-loosening direction serving to move said tooth into more firm engagement with the engaged ones of said row of teeth firmly to wedge said strap between said strap-bearing surface and said pawl, whereby to prevent inadvertent withdrawal of said strap from said frame and thus, to lock said strap in its tensioned condition about the bundle of wires.

This comparison reveals that *every* limitation of Claim 26 is anticipated by Emery once one accepts the trial court's finding that, as shown in Figure 1 of that patent (DP 11), the inserted strap will be wedged against an opposing frame wall by the pawl. And the trial court's finding was also critical to the conclusion that Claim 24 was invalid since that claim differs only by its reference to multiple teeth which, as even the Federal Circuit concedes, "had nothing to do with allowance of the '146 patent." (A 39a; 19a.)

Panduit has simply sidestepped the issue of the Federal Circuit's failure to apply Rule 52(a). It has not made an adequate response to Dennison's petition.

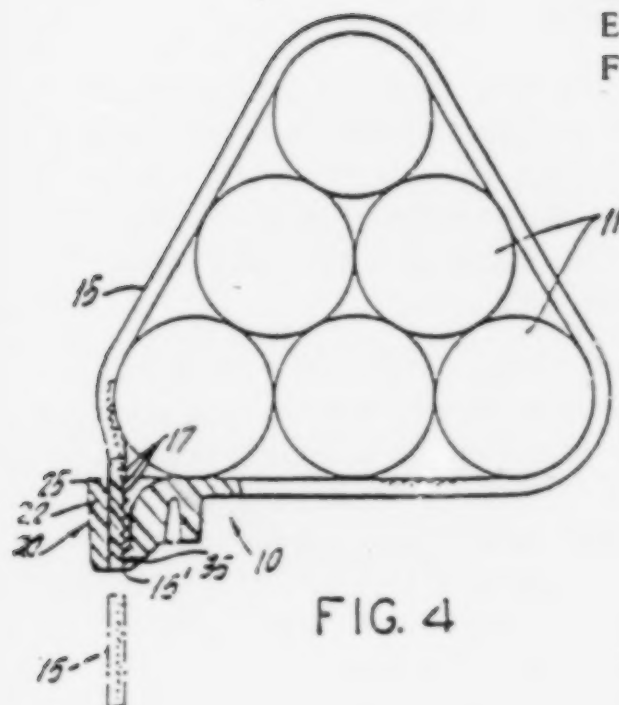
II. THE FEDERAL CIRCUIT'S CONCLUSION THAT THE '869 AND '538 PATENTS ARE VALID WAS BASED ON ITS REFUSAL TO ACCEPT THE TRIAL COURT'S FINDINGS REGARDING THE DIFFERENCES BETWEEN THE CLAIMED SUBJECT MATTER AND THE PRIOR ART

Panduit's response never comes to grips with a fundamental basis for Dennison's petition, namely that the trial court correctly made fact findings regarding the differences between the claimed subject matter and the prior art, and that the Federal Circuit then refused to accept these findings. Panduit instead makes the irrelevant argument that 35 U.S.C. § 103 requires consideration of the invention "as a whole". Panduit simply refuses to discuss the fact that before the invention "as a whole" can even be considered, fact findings regarding the differences must be made.

Concerning Panduit's representative Claim 10 of the '869 patent (A 40a), the issue is whether the trial court found correctly that the "ledge" was the only difference between the claim recitals and the prior art. That the trial court was correct is illustrated dramatically by the following comparison with the prior art Orban patent:



- A. 10, 15.
- B. 17.
- C. 20.
- D. 31 (not "ledge").
- E. 30.
- F. 35.



- A. 10. An integral one-piece cable tie to be tensioned about a bundle of wires and the like, said cable tie comprising an elongated flexible strap,
- B. a row of abutments disposed on one longitudinal surface of said strap and arranged transversely with respect thereto,
- C. a frame integral with one end of said strap and including an end wall and an abutment wall and a pair of longitudinally extending and spaced-apart side walls interconnecting said end wall and said abutment wall, said frame having an entry surface and an exit surface and a strap-receiving opening extending therethrough,
- D. a ledge on said end wall extending between and interconnecting said side walls and extending longitudinally from said end wall toward said abutment wall,
- E. a pawl disposed within said frame in said strap-receiving opening and pivotally mounted on and integral with said ledge, said abutment wall having a strap-bearing surface disposed toward said pawl and defining therewith a strap-receiving throat, the longitudinal axis of said throat being disposed substantially normal to the longitudinal axis of said strap as molded,
- F. and a tooth on said pawl arranged transversely with respect thereto and disposed toward said abutment wall and shaped to engage said row of abutments on said strap, said strap being deformable into a loop encircling a bundle of wires with the free end of said strap extending into said strap-receiving throat and through the opening in said frame and therebeyond, said tooth being disposed toward said row of abutments as said strap is tensioned about the bundle of wires to a tensioned condition and release of said strap causing at least one of said abutments firmly to engage said tooth, any force tending to withdraw said strap from within said strap-receiving throat in a strap-loosening direction serving to move said tooth into more firm engagement with the engaged ones of said row of abutments firmly to grip said strap between said strap-bearing surface and said pawl, whereby to prevent inadvertent withdrawal of said strap from said frame and thus to lock said strap in its tensioned condition about the bundle of wires.

The *sole* difference between Orban and Claim 10 resides in the recitation of a "ledge", which consists of a base supporting the pawl from *underneath* (A 4a), as opposed to side support as provided by Orban. Once the trial court had focused on this *sole* difference, it correctly concluded that one skilled in the art would be led by the teachings of Litwin and others to use such a base (A 50a). The trial court said: "I am unable to tell whether there is a ledge in Orban . . ."; but it is clear that the trial court concluded that the '869 invention "as a whole" was suggested to one skilled in the art by the combined teachings of the references.²

In the case of the '538 patent, the trial court recognized that the only differences between that tie and the prior art ties involved the interposing of a "hinge" between the pawl and the underlying ledge (A 51a). Again, the invention "as a whole" was considered when the trial court concluded that prior art cable ties such as disclosed by Litwin suggest the invention to one skilled in the art.

The Federal Circuit simply refused to accept the trial court's findings regarding such differences. And the Federal Circuit's error was compounded first by its failure to state its own view of the differences, and then by its failure to consider "The Obviousness of the Differences" as required by this Court in *Graham v. John Deere Co.*, 383 U.S. 1, 24.

Panduit follows that same erroneous course. Nowhere in its response will the Court find any specific reference to a difference other than those discussed by the trial court. The obvious reason for this is that there are no other differences, and it was error for the Federal Circuit to conclude otherwise.

² Litwin was also relied on by the trial court in *All States Plastic Mfg. Co., Inc. v. Weckesser Co., Inc.*, 395 F. Supp. 94, 98 (N.D. Ill., 1973). Panduit is simply wrong when stating that the prior art considered by the Seventh Circuit in the appeal of that case was "substantially more extensive than the prior art available to Dennison in the instant case." (PB 4.)

III. DENNISON HAS NOT MADE ANY MIS-REPRESENTATIONS BEFORE THIS COURT, NOR WERE THERE ANY INCORRECT STATEMENTS MADE TO THE COURT OF APPEALS.

Panduit's assertions at PB 11-14 are diversionary, but do warrant a response to insure that no impression is given that Dennison agrees with Panduit.

The '538 prosecution history reveals that Panduit originally described the hinge of that structure as "non-collapsible", but Panduit then attempted to add a drawing and written description pointing out that:

"... the hinge 161 tends to collapse and permit the lower end of the pawl 160 to shift to the right as viewed in Fig. 10A . . . this being the ultimate-load position of the parts."

Panduit then argued that:

"The specification has been amended to correct certain informalities therein, and there has been added further descriptive material and a new sheet of drawing illustrating a further *inherent* property of the cable tie *originally disclosed and claimed* herein." (Emphasis supplied.)

and that:

"In the original drawings and specification there were illustrated and described a sequence of several configurations assumed by the various parts of the cable tie 100 during the application thereof about a bundle, as indicated, for example, in Figs. 7-10 of the drawings. The amendment and letter to the Chief Draftsman filed on September 4, 1970 *simply presented the next in this sequence of configurations which would obviously and necessarily result when additional force in the direction of the arrow 175 was applied to a cable tie strap disposed in the configuration illustrated in FIG. 10.* It is respectfully submitted that these amendments *in no way alter the description of the physical cable tie structure* which is the subject matter of the claims on appeal, but simply clarify

and explain the description of the behavior of this structure as a result of the *inherent* properties of the device.” (Emphasis supplied.)

Dennison’s statements to this Court and to the Federal Circuit were 100% accurate, and nothing said by Panduit’s counsel in colloquy before the trial court can change that fact. But more significantly, this petition should be reviewed because of the critical errors made by the Federal Circuit, and not on the basis of such secondary disputes.

CONCLUSION

It is apparent that the decision of the Federal Circuit resulted from its refusal to accept key fact findings, findings which were based on competent evidence. Panduit’s response to Dennison’s petition does not deal with that question, but focuses instead on unrelated aspects of the case.

Dennison’s petition should be granted to avoid a substantial miscarriage of justice.

Respectfully submitted,

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OPINION

4

SUPREME COURT OF THE UNITED STATES

DENNISON MANUFACTURING COMPANY *v.*
PANDUIT CORP.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 85-1150. Decided April 21, 1986

PER CURIAM.

Respondent holds three patents for plastic cable ties, products that are commercially successful. Petitioner copied respondent's products, was sued for patent infringement in the Northern District of Illinois, and defended on the ground that the patents were invalid for obviousness. The trial judge examined the prior art, identified the differences between the prior art and each of the three patents at issue, and concluded that all of the improvements made by the three patents over the prior art would have been obvious to one skilled in that art. In the course of arriving at this conclusion, the trial judge recognized that the presumption of patent validity must be overcome by clear and convincing evidence, that the patents' commercial success and the failure of competitors to develop equally successful inventions were important factors weighing in favor of the validity of the patents, and that in addressing the question of obviousness a judge must not pick and choose isolated elements from the prior art and combine them so as to yield the invention in question if such a combination would not have been obvious at the time of the invention. Nonetheless, the judge found that respondent's patents were invalid for obviousness.

The Court of Appeals for the Federal Circuit reversed. 774 F. 2d 1082 (1985). The court disagreed with the District Court's assessment of the prior art, ruled that the references cited by the District Court did not teach the innovations introduced by respondent, and referred to other errors made by the District Court.

3pp

Petitioner contends that the Federal Circuit ignored Federal Rule of Civil Procedure 52(a) in substituting its view of factual issues for that of the District Court. In particular, petitioner complains of the rejection of the District Court's determination of what the prior art revealed and its findings that the differences identified between respondent's patents and the prior art were obvious.

Petitioner's claims are not insubstantial. As this Court observed in *Graham v. John Deere Co.*, 383 U. S. 1, 17-18 (1966):

"While the ultimate question of patent validity is one of law, . . . the § 103 condition [that is, nonobviousness] . . . lends itself to several basic factual inquiries. Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unresolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy."

This description of the obviousness inquiry makes it clear that whether or not the ultimate question of obviousness is a question of fact subject to Rule 52(a), the subsidiary determinations of the District Court, at the least, ought to be subject to the Rule.

The Federal Circuit, however, did not mention Rule 52(a), did not explicitly apply the clearly-erroneous standard to any of the District Court's findings on obviousness and did not explain why, if it was of that view, Rule 52(a) had no applicability to this issue. We therefore lack an adequate explanation of the basis for the Court of Appeals' judgment: most

importantly, we lack the benefit of the Federal Circuit's informed opinion on the complex issue of the degree to which the obviousness determination is one of fact. In the absence of an opinion clearly setting forth the views of the Court of Appeals on these matters, we are not prepared to give plenary consideration to petitioner's claim that the decision below cannot be squared with Rule 52(a). Instead, we grant the petition for certiorari, vacate the judgment, and remand the case to the Court of Appeals for further consideration in light of Rule 52(a).

It is so ordered.

OPINION

5

SUPREME COURT OF THE UNITED STATES

DENNISON MANUFACTURING COMPANY v.
PANDUIT CORP.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 85-1150. Decided April 21, 1986

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See *Cuyahoga Valley Railway Co. v. United Transportation Union*, — U. S. —, — (MARSHALL, J., dissenting); *Maggio v. Fulford*, 462 U. S. 111, 120-121 (1983) (MARSHALL, J., dissenting).

1986

DOCKET

85-1180-ADX Title: Edwin Meese, III, Attorney General of the United States and Joseph E. Clarkson, Appellants
 Status: GRANTED V. Barry Keene
 Docketed: Court: United States District Court for the Eastern District of California
 January 9, 1986
 See also: Counsel for appellant: Solicitor General
 85-1837 Counsel for appellee: Donhoff Jr., John G.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Entry	Date	Note	Proceedings and Orders
1	Nov 26 1985		Application for extension of time to docket appeal and order granting same until January 9, 1986 (Rehnquist, November 27, 1985).
2	Jan 9 1986	G	Statement as to jurisdiction filed.
4	Feb 21 1986		Order extending time to file response to jurisdictional statement until March 21, 1986.
5	Mar 14 1986		Brief amicus curiae of Mitchell Black, et al. filed.
6	Mar 21 1986		Motion of appellee Barry Keene to affirm filed.
7	Mar 26 1986		DISTRIBUTED. April 16, 1986
8	Apr 21 1986		PROBABLE JURISDICTION NOTED. *****
10	Jun 3 1986		Order extending time to file brief of appellant on the merits until July 7, 1986.
11	Jun 11 1986		Record filed.
12	Jun 11 1986		Certified copy of original record on appeal received.
13	Jul 7 1986	G	Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae filed.
14	Jul 7 1986		Brief of appellants Meese, Atty. Gen. of U.S., et al. filed.
15	Jul 18 1986		Order extending time to file brief of appellee on the merits until September 15, 1986.
17	Jul 25 1986		Joint appendix filed.
18	Sep 3 1986		Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae GRANTED.
19	Sep 15 1986		Brief amicus curiae of Playboy Enterprises, et al. filed.
20	Sep 15 1986		Brief amicus curiae of ACLU, et al. filed.
21	Sep 15 1986		Order further extending time to file brief of appellee on the merits until September 20, 1986.
22	Sep 18 1986		Brief amicus curiae of The Freedom to Read Foundation filed.
23	Sep 20 1986		Brief of appellee Barry Keene filed.
25	Oct 6 1986		SET FOR ARGUMENT. Tuesday, December 2, 1986. (1st case) (1 hour).
26	Oct 10 1986		CIRCULATED.
27	Nov 25 1986	X	Reply brief of appellant Meese, Atty. Gen. of U.S. filed.
28	Dec 2 1986		ARGUED.

JURISDICTIONAL

STATEMENT

85-1180 (1)

Supreme Court, U.S.

FILED

JAN 9 1986

JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

EDWIN MEESE III, ATTORNEY GENERAL OF THE
UNITED STATES, AND JOSEPH E. CLARKSON, APPELLANTS

v.

BARRY KEENE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the use of the term "political propaganda" in the Foreign Agents Registration Act, 22 U.S.C. 611 *et seq.*, which is expressly defined in the Act in a neutral and valid way, violates the First Amendment because in common usage the word "propaganda" might be understood to have a pejorative meaning.

2. Whether appellee, who is not a foreign agent under the Act and is not subject to the requirements or sanctions of the Act, has standing to challenge the constitutionality of the statutory term "political propaganda" on the ground that the use of that term is alleged to have chilled his exercise of First Amendment rights.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No.

EDWIN MEESE III, ATTORNEY GENERAL OF THE
UNITED STATES, AND JOSEPH E. CLARKSON, APPELLANTS

v.

BARRY KEENE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the district court (App., *infra*, 1a-31a, 36a-42a) are reported at 619 F.Supp. 1111. The earlier opinion of the district court issuing a preliminary injunction (App., *infra*, 44a-65a) is reported at 569 F. Supp. 1513.

JURISDICTION

The judgment of the district court (App., *infra*, 32a-34a) was entered on September 13, 1985. A notice of appeal to this Court (App., *infra*, 35a) was filed on October 11, 1985. On October 29, 1985, the district court granted appellants' timely motion to alter or amend the judgment under Fed. R. Civ. P. 59(e), and the judgment was accordingly modified (App., *infra*, 40a). A notice of appeal to this Court from the amended judgment of October 29 (App., *infra*, 43a) was filed on November 12, 1985. On November 27, 1985, Justice Rehnquist extended the time within which to docket the appeal to

(1)

and including January 9, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.¹

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Foreign Agents Registration Act, 22 U.S.C. 611 *et seq.*, are set forth at App., *infra*, 66a-70a.

STATEMENT

1. This case arises under the Foreign Agents Registration Act (FARA), 22 U.S.C. 611 *et seq.* As Congress has explained, it is

the policy and purpose of this Act * * * to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities.

22 U.S.C. 611 note.

¹ Appellants' Rule 59(e) motion requested that the district court narrow the substantive terms of the injunction that the court had entered based on its constitutional ruling. Because this timely motion, which was granted by the district court on October 29, sought to amend the September 13 judgment in a substantive and material way, we believe that the finality of the judgment was suspended during the pendency of the motion, and therefore that the time for filing a notice of appeal did not begin to run until the court entered an amended judgment on October 29. See *FCC v. League of Women Voters*, No. 82-912 (July 2, 1984), slip op. 7-9 n.10; *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 445-446 & n.4 (1974); *United States v. Adams*, 383 U.S. 39, 41-42 & n.1 (1966); see also *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982); *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 450-451 (1982). Out of an abundance of caution, however, we have filed notices of appeal from both the original and the amended judgments and have obtained an extension of time in order to permit the docketing of the appeal in a manner that will be timely as measured from the date of either judgment.

FARA establishes a comprehensive scheme of registration, reporting, and disclosure for "agents" of "foreign principals." The Act defines "foreign principal" to include "a government of a foreign country." 22 U.S.C. 611(b)(1). In addition, it defines "agent of a foreign principal" to mean in relevant part "any person who acts as an agent, representative, employee, or servant * * * of a foreign principal" and "who directly or through any other person * * * engages within the United States in political activities for or in the interests of such foreign principal * * *." 22 U.S.C. 611(c).

An agent of a foreign principal as defined in the Act is required to file a registration statement with the Attorney General. The registration statement shall include, among other things, the agent's name and nationality; a comprehensive statement of the nature of the agent's business; the name of every foreign principal for whom the agent is acting; the terms of the agreement between the agent and the foreign principal; the activities engaged in by the agent, including a detailed statement of any political activities; and the compensation or reimbursement received by the agent and the expenditures made by the agent. 22 U.S.C. 612.

In addition to filing a registration statement, an agent of a foreign principal is required to submit to the Attorney General a copy of any "political propaganda for or in the interests of such foreign principal" that the agent transmits in the United States mails or by any means of interstate or foreign commerce. 22 U.S.C. 614(a).² The Act defines the term "political propaganda" to include any communication that

is reasonably adapted to * * * in any * * * way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a gov-

² The Act also requires the agent to submit to the Attorney General a report setting forth the places, times, and extent of such dissemination. 22 U.S.C. 614(a); see also 22 U.S.C. 616(a).

ernment of a foreign country * * * or with reference to the foreign policies of the United States * * *.

22 U.S.C. 611(j).

The agent must mark any such materials with an identification statement that sets forth the relation between the agent and the materials, explains that the agent is registered with the Department of Justice under the Act and discloses the name of the agent and the foreign principal, advises that the agent's registration statement and the disseminated materials are available for inspection at the Department of Justice, and contains a disclaimer that registration of the agent does not indicate approval by the United States of the contents of the materials. 22 U.S.C. 614(b); see also 22 U.S.C. 614(c). The standard form of the identification statement for films does not use the statutory term "political propaganda" and reads as follows:

This material is prepared, edited, issued or circulated by (name and address of registrant) which is registered with the Department of Justice, Washington, D.C. under the Foreign Agents Registration Act as an agent of (name and address of foreign principal). Dissemination reports on this film are filed with the Department of Justice where the required registration statement is available for public inspection. Registration does not indicate approval of the contents of this material by the United States Government.

PX I to Original Complaint (Mar. 24, 1983).

The labeling requirement is applicable only to agents of foreign principals under the Act and does not apply to subsequent disseminators or recipients of the materials, such as appellee. In fact, such people are free to remove the identification statement that the foreign agent was required to affix to the materials (App., *infra*, 49a, 54a-55a n.2).

2. The National Film Board of Canada (Ottawa) produces films in Canada. It is an agency of the government of Canada and thus a "foreign principal" under the

Act. The National Film Board of Canada (New York office) (NFBC-NY) is the agent of the National Film Board of Canada (Ottawa) in the United States and since 1947 has registered with the Attorney General pursuant to FARA (App., *infra*, 5a). In complying with the labeling provisions of FARA, the NFBC-NY does not routinely include the required identification statement in its materials but instead submits the films to the Department of Justice for a determination of the ones that are covered by the Act (App., *infra*, 48a).

In 1982, the NFBC-NY submitted to the Department a list of 62 films and videotapes that it had distributed during that year. The Department reviewed five of the films and concluded that three of them included "political propaganda" within the meaning of the Act. Two of the films, *Acid from Heaven* and *Acid Rain: Requiem or Recovery*, address the subject of acid rain; the third film, *If You Love This Planet*, concerns nuclear war. App., *infra*, 45a, 48a.

3. a. In March 1983, appellee, an attorney and California state legislator, commenced the instant action in the United States District Court for the Eastern District of California to challenge the constitutionality of the term "political propaganda" in the Foreign Agents Registration Act. Appellee alleged that he desired to exhibit the three Canadian films but was "deterred from exhibiting the films by a statutory characterization of the films as 'political propaganda'" and that "if he were to exhibit the films while they bore such characterization, his personal, political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired" (App., *infra*, 45a). Plaintiff sought a preliminary and permanent injunction against application of the Act to the three films.

The district court denied the government's motion to dismiss and granted appellee's motion for a preliminary injunction (App., *infra*, 44a-65a). Although the court found that appellee had no standing to challenge the labeling requirement imposed on the agent (*id.* at 54a-

55a) it held that he did have standing to challenge the validity of the use of the term "political propaganda" in the Act. The court concluded that appellee's "status as a would-be exhibitor * * * differentiates him from citizens generally," that appellee "is likely and reasonably to be understood as using the film to communicate [his] own ideas," and that "a statute which inhibits the exhibitor's ability to exhibit also impinges on the exhibitor's ability to communicate" (*id.* at 51a-52a). The court also found that appellee's complaint "adequately alleges an injury that is both real and immediate: exhibition of the films which the statute characterizes as 'political propaganda' will brand [appellee], as an exhibitor, as a purveyor of propaganda, which will have an adverse impact on [appellee's] professional and personal reputation" (*id.* at 52a). Finally, the court determined that the alleged injury could fairly be traced to the government's actions and could be remedied by judicial relief: "[appellee] has made the requisite showing by alleging that the Act characterizes the films that [he] wants to exhibit as 'political propaganda,' that such a characterization necessarily denigrates the contents of the films and vilifies [appellee] as a purveyor of propaganda, and that as a result of such vilification clients and constituents will peremptorily reject the ideas that [appellee] hopes to communicate" (*id.* at 53a).

With respect to the merits of appellee's claim, the district court determined that "the present action raises a substantial question warranting litigation" (App., *infra*, 57a). In particular, the court rejected the government's argument that the phrase "political propaganda" as defined in the Act does not denigrate the materials covered by the statute. It found that "'[p]olitical propaganda' is ordinarily and commonly understood to mean material that contains half-truths, distortions, and omissions," and that "[t]o characterize a particular expression of political ideas as 'propaganda' is to denigrate those ideas" (*id.* at 59a). Furthermore, relying on the legislative history of the original 1938 Act, the court also

came "to the tentative conclusion that Congress did, in fact, intend to denigrate the affected materials by the use of the term 'political propaganda'" (*id.* at 60a). The court therefore concluded that "Congress could easily have imposed an identification requirement without denigrating the affected materials" (*id.* at 58a) and that "Congress was acting artlessly when it defined the term 'political propaganda'" (*id.* at 62a); in the court's view, "Congress must ultimately respect the limits of the English language * * *. This Court therefore harbors some doubt about the power of Congress to select a term which has a widely understood negative connotation and to designate it as a term of art theoretically having no negative connotation" (*id.* at 62a-63a).

Based on these conclusions, the district court entered a preliminary injunction preventing the defendants "from imposing any of the requirements of the Foreign Agents Registration Act on the [three films in question] pending the disposition of this action" (App., *infra*, 65a). Although recognizing that appellee had no standing to challenge the labeling requirement applicable to the NFBC-NY, the court concluded that "it is impossible to give [appellee] any effective relief *pendente lite* without exempting the films which [appellee] wants to exhibit from the requirements of the Act. The labelling requirement only has application to those materials termed in the statute 'political propaganda.' It is the term 'political propaganda,' however, about which [appellee] complains * * *. [S]o long as defendants are enjoined from employing that definition, they must be enjoined from requiring labelling and reports in accordance with [the Act]" (*id.* at 64a).

b. Thereafter, the district court granted summary judgment to appellee on his request for a permanent injunction (App., *infra*, 1a-31a). The court first adhered to its prior ruling that appellee had standing to contest the validity of the statutory language because he alleged that "he is deterred from * * * [exhibiting the three Canadian films] by the government's characterization of

the materials as 'political propaganda'" (*id.* at 6a; see also *id.* at 13a-14a). The court reasoned that appellee was complaining "not * * * of a 'chilling effect' on the exercise of his First Amendment rights" but instead "of a species of censorship" (*id.* at 10a)³ and that "it is patently absurd to suggest that one whose expression has been censored by the government lacks standing to complain of that censorship" (*ibid.*). Moreover, the court found it "immaterial" that appellee, because he was not the agent of a foreign principal under FARA, was not subject to the registration, labeling, or reporting requirements of the Act (*id.* at 12a); rather, the court concluded that "[t]he statute puts [appellee] to the Hobson's choice of foregoing the use of the three Canadian films for the exposition of his own views or suffering an injury to his reputation" (*id.* at 15a), and that this establishes "the indirect way in which the statute abridges his freedom of speech" (*ibid.*). Finally, the court recognized that in upholding appellee's standing it had "part[ed] company" (*id.* at 13a) with the contrary decision in *Block v. Smith*, 583 F. Supp. 1288 (D.D.C. 1984), appeal pending, No. 84-5318 (D.C. Cir. argued Feb. 12, 1985).

Turning to the merits, the district court explained that appellee "is not challenging the power of Congress to require that materials produced by or under the aegis of a foreign government be labeled as to source" (App., *infra*, 16a). In fact, the court recognized that "[a] revelation of source as a means of impeaching the persuasive force of any piece of advocacy is wholly legitimate, and, indeed, consistent with the loftiest conceptions of the First Amendment" (*id.* at 25a). Hence, as the court found, it "can hardly be gainsaid" that the disclosure purpose

³ The court elaborated that "[a] 'chilling effect' occurs when an actor is prospectively dissuaded from engaging in First Amendment protected activities by a threat of government sanction. Censorship, by contrast, consists of present governmental interference with or suppression of expression" (App., *infra*, 10a).

of the Act "serves rather than disservices the First Amendment" (*id.* at 27a).

Rather than challenging the substantive validity of FARA, appellee "asserts that the use of the phrase 'political propaganda' to describe the materials subject to the Act so denigrates the materials that they are made unavailable to [appellee] as a medium for the expression of his own views and that the freedom of speech guaranteed to [appellee] by the First Amendment is, therefore, abridged" (App., *infra*, 2a; see also *id.* at 27a). Thus, "the question presented is whether Congress may, consistent with the Constitution, apply a denigrating phrase to those materials [covered by FARA] thereby rendering the materials unavailable to American citizens who wish to use the materials as media for personal expression" (*id.* at 16a).

The district court acknowledged that "political propaganda" is "a term of art to describe every sort of communicative or expressive medium intended or reasonably adapted to influence persons within the United States with respect to * * * foreign or domestic policies" (App., *infra*, 2a; see also *id.* at 16a, 17a, 18a, 20a, 21a, 30a). The court also recognized that the Act contains a "neutral statutory definition" of the term (*id.* at 20a) that "carries no negative connotation" (*ibid.*). And the court further found that "there are dictionary meanings of the word 'propaganda' that do not suggest a negative connotation" (*ibid.*).⁴

Nevertheless, the district court held that "Congress is without the constitutional power to use the phrase 'political propaganda' to describe the materials subject to the statute's labeling requirement, because those materials are 'core' First Amendment materials and because the use of such a term abridges [appellee's] freedom of speech"

⁴ The court also noted that the "the information required by the disclosure statement seems wholly innocuous" (App., *infra*, 5a). As explained above (see page 4, *supra*), the identification statement affixed to the films does not use the term "political propaganda."

(App., *infra*, 22a). Relying on dictionary definitions of "propaganda" and the affidavits of academics and journalists, the court found, "as a matter of fact, that the phrase 'political propaganda,' and particularly the word 'propaganda,' is a 'semantically slanted word'" and that "the term 'propaganda' as used in ordinary speech is a word of reproach" (*id.* at 19a (citation omitted)). On that basis, the court determined that "whoever disseminates materials officially found to be 'political propaganda' runs the risk of being held in a negative light by members of the general public" (*id.* at 26a). Concluding that the First Amendment proscribes "a statute whose purpose is entirely proper, but which inadvertently burdens speech by the terms in which it is couched" (*id.* at 24a), the court held that "the use by Congress of an inflammatory phrase to designate (or denigrate) clearly protected First Amendment materials abridges [appellee's] speech" (*id.* at 21a).

In addition, the district court concluded that "the suppression of speech was part of the intent of Congress in adopting the challenged portion of the Foreign Agents Registration Act" (App., *infra*, 24a). The court conceded that from the enactment of FARA in 1938 "[t]he purpose of [the statute] has always been, at least in part, to give notice to the recipients of materials * * * [from a] foreign government of the source of such materials" (*id.* at 3a), that the original Act "was *primarily* intended as a 'sunshine' statute" (*id.* at 24a (emphasis in original)), and that, in connection with subsequent amendments, "Congress deemed it appropriate to modify the xenophobic tenor of the original Act and to emphasize the 'sunshine' aspect of the law" (*id.* at 4a). Nonetheless, the court decided that "Congress enacted the portion of FARA at issue in order to suppress or restrict that which it found abhorrent. Despite its employment of a wholly legitimate means to that end, Congress used the appellation, 'political propaganda,' which it understood and intended as a term of opprobrium, and by which it intended to discourage or suppress speech" (*id.* at 25a).

Finally, the district court ruled that the abridgement of speech that it had found could not be justified on the ground that the statute was narrowly drafted to further a compelling governmental interest. Looking to the need for the specific statutory language in question, the court found that there was "no justification compelling or otherwise for the use of the phrase 'political propaganda'" (App., *infra*, 28a).

For these reasons, the district court held that Congress's use of the phrase "political propaganda" was unconstitutional. Emphasizing its view that such usage did not reflect "the best solution to a knotty problem of draftsmanship" (App., *infra*, 29a), the court reasoned that "[h]owever difficult it may be to draft a statute, it is surely not beyond reason to demand that those whose business is communication communicate with their audience in terms of their audience's linguistic conventions" (*ibid.*). Accordingly, the court permanently enjoined enforcement of "any portion of the Foreign Agents Registration Act which incorporates the term 'political propaganda' as a term of art. 22 U.S.C. §§ 611(j) and 614(a) (b) and (c)" (App., *infra*, 31a). The court also stated that these provisions were severable from the remainder of FARA and that its decision did not adjudicate the validity of any other part of the Act (*id.* at 30a).

c. The government timely moved to alter the district court's judgment pursuant to Fed. R. Civ. P. 59(e). Although the government did not seek reconsideration of the court's basic holding of unconstitutionality, it did request substantive modification of the terms of the injunction entered by the court. The court granted this motion and limited its order to enjoining enforcement of the provisions of 22 U.S.C. 611(j) and 614(a)-(c) with respect to the three films at issue in this case (App., *infra*, 36a-42a).

THE QUESTIONS ARE SUBSTANTIAL

The district court's decision in this case, holding unconstitutional the term "political propaganda" in the Foreign Agents Registration Act, represents an erroneous

and unprecedented exercise of the power of judicial review. Although not questioning the substantive validity of the Act, and indeed finding that the Act affirmatively promotes First Amendment values, the district court concluded that the statute is linguistically invalid because of the terminology Congress used. And in reaching its conclusion the district court disregarded the express provision in the Act that defines "political propaganda" in a neutral and constitutionally unobjectionable way comporting with accepted dictionary meanings of the term. The district court thus struck down the statute not because of what it does but because of what it says and, more particularly, because of the way the statute says it and the possibility that its language might be *misunderstood* to have a meaning exactly contrary to the statutory definition provided by Congress.

Moreover, the district court's ruling comes in a case in which the plaintiff lacked standing to sue. By permitting such actions to be brought, the decision below opens up the federal courts to litigants who have no cognizable interest at stake and seek to use the judicial process to air political grievances or publicize policy disputes.

Accordingly, this Court's review under 28 U.S.C. 1252 is plainly warranted. Because the error in the district court's decision is manifest, we suggest that the Court should summarily reverse the judgment below.

1. a. The power of judicial review. "to judge the constitutionality of an Act of Congress * * * [is] 'the gravest and most delicate duty that * * * [a court] is called upon to perform.'" *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981), quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.). See also *Regan v. Time, Inc.*, No. 82-729 (July 3, 1984), slip op. 10; *United States v. Raines*, 362 U.S. 17, 20-21 (1960); *Ashwander v. TVA*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring). In undertaking such review, "[t]he question for [the courts], of course, is not whether Congress could have done a better job, but whether the job it did violates [the Constitution]." *Regan v. Time, Inc.*, slip op. 12-13 (Stevens, J., concurring in the judgment in part and

dissenting in part). And in answering that question, courts must be mindful of "the strong presumption in favor of the validity of congressional action" (*Schweiker v. McClure*, 456 U.S. 188, 200 (1982)) and give "great weight to the decisions of Congress" (*Rostker v. Goldberg*, 453 U.S. at 64 (citation omitted)).

In invalidating the term "political propaganda" in the Foreign Agents Registration Act, the court below adopted an erroneous method of analysis and departed from the proper role of the federal judiciary. In effect, the district court undertook to review and edit Congress's choice of statutory language. However, just as courts "naturally do[] not review congressional enactments as a panel of grammarians" (*Flora v. United States*, 362 U.S. 145, 150 (1960)), so too Article III judges are not professors whose job it is to grade Congress on its legislative drafting skills or mastery of English usage. See also *Cole v. Richardson*, 405 U.S. 676, 684 (1972); *Costanzo v. Tillinghast*, 287 U.S. 341, 344 (1932); *Cole v. Richardson*, 397 U.S. 238, 240 (1970) (Harlan, J., concurring in the result). The district court's "red pencil" approach to constitutional adjudication is fundamentally misconceived.

The Foreign Agents Registration Act expressly defines the term "political propaganda" to mean

any * * * communication * * * which is reasonably adapted to * * * influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country * * * or with reference to the foreign policies of the United States * * *.

22 U.S.C. 611(j). Thus, "political propaganda" is used as a broad, generic designation of the materials covered by the Act.⁵ The district court conceded that the phrase

⁵ The district court did not suggest that the term "political propaganda," either on its face or as applied in the administration of the Act, constitutes a content-based standard or discriminates against certain viewpoints or issues. We note that in 1983, when

"political propaganda" in FARA is a "term of art" (App., *infra*, 2a, 16a, 17a, 18a, 20a, 21a, 30a) and that the "statutory definition" of the term is "neutral" (*id.* at 20a) and "carries no negative connotation" (*ibid.*). In addition, the court acknowledged that this statutory definition accords with "dictionary meanings of the word 'propaganda' that do not suggest a negative connotation" (*ibid.*).⁶ In these circumstances, the district court erred in striking down Congress's use of the term "political propaganda."⁷

As this Court has recognized, it is "both within the right and the wisdom of Congress not to trust to the

the Canadian films in this case were classified, other films designated as "political propaganda" included *Flight of Soviet Jewry: Let My People Go*, which was disseminated in the interest of the Consulate General of Israel, and *Berlin Means Business and More*, distributed in the interest of the Berlin Economic Development Corporation.

⁶ All standard dictionaries include a definition of "propaganda" as the systematic or widespread dissemination or promotion of ideas or doctrines. See, e.g., *Webster's Third New International Dictionary* 1817 (1976 ed.) ("dissemination of ideas, information, or rumor for the purpose of helping or injuring an institution, a cause, or a person"; "doctrines, ideas, arguments, facts, or allegations spread by deliberate effort through any medium of communication in order to further one's cause or to damage an opposing cause"; "a publication or display having the purpose or effect of furthering or hindering a cause"); 8 *Oxford English Dictionary* 1466 (1978 ed.) ("[a]ny association, systematic scheme, or concerted movement for the propagation of a particular doctrine or practice"); *Random House Dictionary of the English Language* 1152 (1966 ed.) ("information, rumors, etc., deliberately spread widely to help or harm a person, group, movement, institution, nation, etc.").

⁷ We also note that Congress has used the term "propaganda" in a neutral sense in a number of other statutes. See, e.g., 5 U.S.C. 4107; 26 U.S.C. 501(c)(3), 2522(b), 4945(d); 36 U.S.C. 1304. Likewise, this Court has recognized the neutral meaning of the word in referring to a variety of activities as "propaganda." See, e.g., *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974); *National Association of Letter Carriers v. Austin*, 418 U.S. 264, 280 n.14 (1974); *NLRB v. Drivers Local 639*, 362 U.S. 274, 279 (1960).

colloquial or the dictionary meaning of * * * [a word], but to write its own." 62 *Cases of Jam v. United States*, 340 U.S. 593, 596 (1951). Where, as in this case, an Act of Congress contains its own definition, the "statutory definition[] of terms * * * prevail[s] over colloquial meanings." *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490, 502 (1945). "Statutory definitions control the meaning of statutory words, of course" (*Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949)), and serve to exclude other meanings of those terms (*Colautti v. Franklin*, 439 U.S. 379, 392 & n.10 (1979)). See also *Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters*, 456 U.S. 717, 722 (1982); *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322, 324-325 (1951); *United States v. Lombardo*, 241 U.S. 73, 76 (1916).

The district court refused to accept the reasonable statutory definition of "political propaganda" but instead looked to "the conventions of ordinary usage" (App., *infra*, 20a) and concluded that "the term 'propaganda' as used in ordinary speech * * * is a word of reproach" (*id.* at 19a). However, "definition by the average man or even by the ordinary dictionary with its studied enumeration of subtle shades of meaning is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others." *Fox v. Standard Oil Co.*, 294 U.S. 87, 96 (1935). Where Congress "has attempted to secure precision and certainty by * * * supplying its own glossary," courts are not "free in despite of it to choose a meaning for [themselves]" (*id.* at 95, 96). The district court's approach would "pervert the process of interpretation" by "mak[ing] a fortress out of the dictionary." *Farmers Reserve & Irrigation Co. v. McComb*, 337 U.S. 775, 764 (1949) (citation omitted).

In addition, the Constitution does not, as the district court believed, require Congress to devise "the best solution to a knotty problem to draftsmanship" or "demand that those whose business is communication communicate with their audience in terms of their audience's linguistic

conventions" (App., *infra*, 29a). Nothing in the Constitution commands that Congress draft statutes in language that, to the satisfaction of federal judges, is not capable of being misunderstood. On the contrary, such a rule is precluded by both the imprecision inherent in the English language and a proper regard for the constitutional separation of powers and the realities of the legislative process. As this Court explained in *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 577-579 (1973):

There might be quibbles about the meaning of * * * [the statutory phrase]; but there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

See also *Tidewater Oil Co. v. United States*, 409 U.S. 151, 157 (1972). Thus, "almost any word or phrase may be rendered vague and ambiguous by dissection with a semantic scalpel," but "[t]his kind of semantic inquiry" "amounts to little more than verbal calisthenics" and "should not occupy the time of federal courts." *Cole v. Richardson*, 397 U.S. 238, 240 (1970) (Harlan, J., concurring in the result).

Even where constitutionally protected activities are involved, it is not the role of the judiciary to second-guess Congress's decisions on issues that are inherently matters of judgment and discretion. In *Buckley v. Valeo*, 424 U.S. 1, 82-84 (1976), for instance, this Court sustained the \$10 and \$100 thresholds for the recordkeeping and reporting requirements of the Federal Election Campaign Act (2 U.S.C. 431 *et seq.*). Although recognizing that the threshold levels "are indeed low" and "may well discourage participation by some citizens in the political process" (424 U.S. at 83), the Court nonetheless rejected the constitutional challenge to those provisions (*ibid.*):

[W]e cannot require Congress to establish that it has chosen the highest reasonable threshold. The line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion.

A similar analysis should apply to Congress's use of one word or phrase rather than another in drafting a statute; legislative choices of language are generally not susceptible to constitutional review by the courts. And here, as elsewhere, it must be remembered that a judge's view of what is wise or desirable is not the same as what the Constitution requires. See, e.g., *Lassiter v. Department of Social Services*, 452 U.S. 18, 33 (1981). Questions of policy and judgment in selecting from among available alternatives are the province of Congress, not the federal judiciary. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 542-543 n.25 (1979); *Hurtado v. United States*, 410 U.S. 578, 591 (1973). It is the responsibility of the legislature rather than the courts to consider claims that laws are assertedly improvident or inartful, and "judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

The district court's decision is also irreconcilable with other settled principles governing judicial review of the constitutionality of federal statutes. This can be seen in several ways. For example, if the Foreign Agents Registration Act had not used the shorthand term "political propaganda" but instead had repeated the lengthy (and neutral) statutory definition in every instance, the validity of the statute would, under the district court's opinion, be beyond question. Thus, the proper judicial response to the district court's concern about the use of the word "propaganda" should have been to define the term in a neutral and constitutionally acceptable manner; such a ruling would be analogous to a clarifying or narrowing construction to correct a statute that is vague or overbroad on its face. See, e.g., *Gooding v. Wilson*, 405 U.S. 518, 520 (1972); *United States v. Harriss*, 347 U.S.

612, 626 (1954). But in this case, of course, no such ruling is necessary, since FARA itself already provides a constitutionally valid definition of the phrase. The challenged Act is no more unconstitutional than if Congress, rather than using the term of art "political propaganda" at all, had inserted the complete and unassailable definition of that term throughout the statute.

Likewise, suppose Congress had used the statutory term "political propaganda" but had supplied no definition of the phrase. If the statute were challenged on the ground that it had (or might possibly be understood to have) a pejorative meaning that violated the First Amendment, a federal court would "have a duty" (*United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, 130 n.7 (1973)) to follow the "cardinal principle" (*Crowell v. Benson*, 285 U.S. 22, 62 (1932)) of construing the statute, if fairly possible, to avoid the constitutional defect. See also, e.g., *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982). As the Court has explained this doctrine, there is "a strong presumption that the law-making body intended to act within, and not in excess of, its constitutional authority" (*Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 546 (1914)), and courts "cannot * * * lightly impute to Congress an intent to invade * * * [constitutional] freedoms" (*Eastern R.R. Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961)). Thus, "[t]he judicial function is 'not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations.'" *Selective Service System v. Minnesota Pub. Service Research Group*, No. 83-276 (July 5, 1984), slip op. 8 (citation omitted). Accordingly, a court confronted with the undefined term "political propaganda" would seek to interpret the statute in a neutral way that both accorded with Congress's intent and would be constitutionally permissible. But surely the Foreign Agents Registration Act is open to no greater challenge because Congress itself offered such a definition on the face of the statute. The district court hence erred in not reading the Act, con-

sistently with Congress's explicit definition, to use the term "political propaganda" in a neutral rather than pejorative fashion.⁸

Finally, even if "political propaganda" were considered to be a pejorative term notwithstanding the statutory definition and the foregoing principles of judicial review, such usage would not render the Act unconstitutional. First, any disparagement that may be involved in the government's characterization of advocacy as "propaganda" does not infringe the advocate's freedom of speech. If an Executive official publicly described the Canadian films as "propaganda," or if a congressional committee conducted an investigation and issued a report calling the films "propaganda," it could hardly be thought that the First Amendment rights of prospective exhibitors of the films would be violated. See *National Student Ass'n v. Hershey*, 412 F.2d 1103, 1114 (D.C. Cir. 1969). Such a categorization, even if intended to denigrate the films by conveying the idea that they are false and distorted, would not amount to an unconstitutional restraint or abridgement of an exhibitor's opportunity to use the films

⁸ Similarly, if Congress had defined the term "political propaganda" in a manner that was unconstitutional in part, the doctrine of severability would require that, insofar as it would be consistent with legislative intent, a court strike down only the invalid portion of the statute and uphold the remainder. See *Brockett v. Spokane Arcades, Inc.*, No. 84-28 (June 19, 1985); *New York v. Ferber*, 458 U.S. at 769 n.24; *Crowell v. Benson*, 285 U.S. at 63. Indeed, Congress included a severability clause in the Act (Ch. 263, § 12, 56 Stat. 258, 22 U.S.C. 611 note), which is an affirmative indication of "the intention of Congress not only that an express provision found to be unconstitutional should be disregarded without disturbing the remainder of the statute, but also that any implication from the terms of the Act which would render them invalid should not be indulged." *Crowell v. Benson*, 285 U.S. at 63. To the extent that the district court concluded that the term "political propaganda" improperly incorporated a pejorative as well as a neutral meaning, it should have confined its holding of unconstitutionality to the invalid portion of the statute and left in place the valid portion—precisely the result that would be reached by accepting the neutral definition of the term that Congress has provided.

in expressing his own point of view.⁹ The Foreign Agents Registration Act, to the extent it embodies a pejorative meaning of the term "political propaganda" at all, stands on no different constitutional footing.

Moreover, given the operation of the Foreign Agents Registration Act, any use of the term "political propaganda" in a pejorative sense does not violate the First Amendment. As explained above (see page 4, *supra*), the identification statement that the registered foreign agent must put on disseminated materials is entirely neutral and does not even use the statutory term "political propaganda."¹⁰ Similarly, in connection with a registered foreign agent's submission of covered materials, the Department of Justice makes no public statement that the materials are "political propaganda." Thus, in the administration of the Act, the phrase "political propaganda" is not publicly used but rather appears only in internal Department of Justice documents and communications with the agent. And, of course, the use of the term "political propaganda" on the face of the Act is explicitly accompanied by the neutral definition in the statute itself.

Accordingly, the sole basis for any asserted First Amendment violation here is that the media or other third parties might publicly utilize the phrase "political propaganda" without adequately conveying the statutorily prescribed definition of this term of art. But the possi-

⁹ In fact, in the real world of political activity, "it may be just as likely that the added publicity about the films because of this controversy may attract a larger audience for [an exhibitor]." *Block v. Smith*, 583 F. Supp. 1288, 1295 n.7 (D.D.C. 1984), appeal pending, No. 84-5318 (D.C. Cir. argued Feb. 12, 1985). See also *Canadian Films and the Foreign Agents Registration Act: Oversight Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 40-41 (1983).

¹⁰ Furthermore, appellee, as an exhibitor, is under no obligation to identify the source of the films and in fact is free to remove the registration statement that the foreign agent is required to include (see page 4, *supra*).

bility that some people might thereby misunderstand the meaning intended by Congress, and that as a result prospective exhibitors would "run[] the risk of being held in a negative light" (App., *infra*, 26a), is too attenuated and remote to support a First Amendment claim. As this Court stated in upholding the constitutionality of the Federal Regulation of Lobbying Act (2 U.S.C. 261 *et seq.*), any such "restraint is at most an indirect one resulting from self-censorship." *United States v. Harriss*, 347 U.S. 612, 626 (1954).

b. In invalidating the statutory language, the district court relied not only on the assumed "chilling" effect of the term "political propaganda" but also on the conclusion that Congress "understood and intended [the phrase] as a term of opprobrium" and "intended [it] to discourage or suppress speech" (App., *infra*, 25a). However, we doubt that such congressional intention would suffice to render the Act unconstitutional. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 382-385 (1968). If, as discussed above, the statute passed by Congress does not impermissibly "chill" expression, it is hard to see why a court should strike down the legislation simply because Congress hoped that there would be a "chilling" effect.

But in any event, there is no basis for the district court's conclusion that Congress intended "political propaganda" as a term of disparagement designed to deter free expression. The Foreign Agents Registration Act was adopted in 1938. At that time, the Act did not use the phrase "political propaganda" or provide for the labeling of such materials; rather, its primary requirement was the registration of agents of foreign principals. The Act was based on a recommendation of the McCormack Committee that "Congress should enact a statute requiring all publicity, propaganda, or public-relations agents or other agents or agencies, who represent in this country any foreign government or a foreign political party or foreign industrial or commercial organization, to register." H.R. Rep. 153, 74th Cong., 1st Sess. 23 (1935). Finding that such agents were seeking "to influence the external

and internal policies of this country" (H.R. Rep. 1381, 75th Cong., 1st Sess. 2 (1937)), Congress enacted FARA "to require all persons who are in the United States for political propaganda purposes * * * to register * * * and to supply information" (*ibid.*).

From the outset, Congress made clear that the Act was a disclosure or "sunshine" law:

The bill does not in any way impair the right of freedom of speech, or of a free press, or other constitutional rights.

* * *

Such propaganda is not prohibited under the proposed bill. The purpose of this bill is to make available to the American public, the sources that promote and pay for the spreading of such foreign propaganda. Our National Food and Drug Act requires the proper labeling of various articles, and safeguards the American public in the field of health. This bill seeks only to do the same thing in a different field, that of political propaganda.

H.R. Rep. 1381, *supra*, at 2-3. By shining "the spotlight of pitiless publicity" on foreign agents, Congress sought to ensure that "our people * * * [would] know the sources" of the information they were receiving (*id.* at 2.)

To be sure, as the district court noted (App., *infra*, 25a), Congress expressed concern about the activities of foreign agents in this country to spread the dogma of Naziism, fascism, and communism. That is hardly surprising, given the perilous times of national and international danger in which the legislation was born. But Congress did not prohibit such activities or construct a statutory scheme designed to suppress them; indeed, contrary to the purpose attributed to it by the district court, Congress could scarcely have thought that proselytizers of those views would have been "chilled" into submission by any purported stigma associated with the word "propaganda." Rather, the approach chosen by Congress was to require the full disclosure of information to the public. As the district court acknowledged (App., *infra*,

25a), "a revelation of source as a means of impeaching the persuasive force of any piece of advocacy is wholly legitimate, and, indeed, consistent with the loftiest conceptions of the First Amendment."¹¹

In 1942, the Act was amended to add the term "political propaganda" and to require that such materials be labeled with an identification statement and a copy submitted to the government. The legislation expressly declared that "the policy and purpose of this Act * * * [are to] requir[e] public disclosure by persons engaging in propaganda activities and other activities for or on behalf of * * * foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities." 22 U.S.C. 611 note. This disclosure purpose is further reflected in the broad and neutral statutory definition of "political propaganda," which, as previously discussed, provides that the term "includes any * * * communication or expression * * * reasonably adapted to * * * influence a recipient * * * with reference to the political or public interests, policies, or relations of a government of a foreign country * * * or with reference to the foreign policies of the United States." 22 U.S.C. 611(j).

The legislative history of the 1942 amendment confirms the disclosure rationale of the statute and the neutral sense in which Congress used the term "political propaganda." For example, the House Report stated that "[i]t cannot be emphasized too strongly that these amendments do not change the fundamental approach of the statute, which is one not of suppression or of censorship,

¹¹ See also, e.g., *Buckley v. Valeo*, 424 U.S. at 64-68; *United States v. Harriss*, 347 U.S. at 625-626; *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 97-100 (1961); *id.* at 138-140 (Black, J., dissenting); *Viereck v. United States*, 318 U.S. 236, 250-251 (1943) (Black, J., dissenting); *Attorney General of the United States v. Irish People, Inc.*, 684 F.2d 928, 956 (D.C. Cir. 1982) (opinion of Wald, J.), cert. denied, 459 U.S. 1172 (1983).

but of publicity and disclosure * * * *. With all this information [required by the amendment] at their disposal; recipients of such propaganda can properly appraise its worth." H.R. Rep. 1547, 77th Cong., 1st Sess. 2, 4 (1941); see also H.R. Rep. 2038, 77th Cong., 2d Sess. 3 (1942). In addition, the Senate Report explained that the term "political propaganda" is "comprehensively defined" in order to ensure that "all political propaganda disseminated by agents of foreign principals" would be subject to the requirements of the Act; thus, the definition of "political propaganda" was intended to be "a broad one," since Congress considered it "desirable that any material which [a foreign agent] disseminates that may be classed as political propaganda be properly labeled and copies filed." S. Rep. 913, 77th Cong., 1st Sess. 9 (1941); see also S. Rep. 1227, 77th Cong., 2d Sess. 3 (1942). This explicit legislative history refutes the district court's conclusion that it was Congress's purpose to suppress objectionable expression by using the term "political propaganda" in a narrow and pejorative sense.¹²

The Foreign Agents Registration Act was further amended in 1966. After stating that the amendments

¹² In fact, President Roosevelt initially vetoed the 1942 Act because he believed that it could interfere with the joint activities of the United States and its wartime allies in areas of national defense. See S. Rep. 1227, *supra*, at 1-2; 88 Cong. Rec. 1139 (1942). In response, Congress enacted a limited exemption to the otherwise applicable requirements of the Act for foreign governments whose interests were deemed by the President to be vital to the defense of the United States. See 22 U.S.C. 613(f). Furthermore, contemporaneous judicial interpretation of the Act recognized that it "sought to bring about a disclosure of the authorship and source of that which appeared in publications and other media of dissemination at the instance of * * * foreign governments * * *, whether friendly or unfriendly, whether violent or mild." *United States v. Kelly*, 51 F. Supp. 362, 363 (D.D.C. 1943). Given that the Act thus applied to "mild" activities on the part of "friendly" governments and would (absent the specific exemption) extend even to wartime activities on behalf of our nation's allies, it can hardly be said that the Act was deliberately intended to disparage and repress speech of which Congress disapproved.

were "designed to strengthen the basic purposes of the original act," Congress explained the statutory scheme as follows:

The act is intended to protect the interests of the United States by requiring *complete public disclosure* by persons acting for or in the interests of foreign principals *where their activities are political in nature or border on the political*. Such public disclosures as required by the act will permit the Government and the people of the United States to be informed as to the identities and activities of such persons and so be better able to appraise them and the purposes for which they act.

H.R. Rep. 1470, 89th Cong., 2d Sess. 2 (1966) (emphasis added); S. Rep. 143, 89th Cong., 1st Sess. 1 (1955) (emphasis added). Congress also noted that the 1966 amendments were "aimed at better focusing the act on those individuals attempting to influence Government policies through political activities" (*ibid.*). Thus, once again, Congress recognized that the statute was intended to be a "sunshine" law that covers all types of political activity and is not confined to those that could be pejoratively characterized as "propaganda."

In sum, both the Act on its face and its consistent legislative history indicate that FARA is a neutral disclosure statute and that the term "political propaganda" is simply a broad generic designation of the materials covered by the Act. There is no basis to conclude, as the district court did, that the term "political propaganda" was used in a narrow, derogatory sense in order to suppress speech that Congress found objectionable.

2. The preceding discussion also demonstrates that appellee lacked standing to bring this suit.

Article III of the Constitution establishes "irreducible minimum" requirements for standing. *Valley Forge College v. Americans United*, 454 U.S. 464, 472 (1982). These requirements "are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of

relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process" (*id.* at 471). Instead, "[a] plaintiff must allege personal injury fairly traceable to the defendant's unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, No. 81-757 (July 3, 1984), slip op. 12-13.

Thus, "Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury.'" *Valley Forge College*, 454 U.S. at 472 (citation omitted). This injury "must be * * * 'distinct and palpable'" rather than "'abstract' or 'conjectural' or 'hypothetical.'" *Allen v. Wright*, slip op. 13 (citation omitted). Moreover, the requisite injury-in-fact must be one caused by "the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.'" *Maryland v. Louisiana*, 451 U.S. 725, 736 (1981), quoting *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). And of course the plaintiff bears the burden of establishing his standing. See *Warth v. Seldin*, 422 U.S. 490, 501-502, 517-518 (1975).

Under this controlling standard, the district court erred in holding that appellee had standing to challenge the constitutionality of the term "political propaganda" in the Foreign Agents Registration Act. It is undisputed that appellee is not an "agent of a foreign principal" under the Act and is not subject to any of the requirements or sanctions prescribed by the Act. It is also undisputed that the identification statement with which the registered agent must label the films does not use the phrase "political propaganda," and in any event appellee is entirely free to remove that label when he exhibits the films (see page 4, *supra*). Nor does the government itself publicly disclose that appellee is exhibiting films that constitute "political propaganda" within the meaning of the Act (see page 20, *supra*). Thus, appellee is essentially a stranger to the Act.

Appellee's claim that *his* First Amendment rights have been violated is based on the assertion that some members of the public might learn, through the media or otherwise, that the Canadian films have been determined to be "political propaganda" under the Act; that these people might misunderstand or not be informed of the definition of this term that Congress provided, and instead might ascribe to it a pejorative meaning; that they might, because of this pejorative characterization, form a negative opinion of appellee himself as the exhibitor of the films; that as a result appellee might suffer an injury to his reputation and consequent damage to his economic, political, or social interests; and that the prospect of such harm has deterred appellee from exhibiting the films as part of his First Amendment expression. Such a chain of reasoning is simply too tenuous and remote to allow appellee to invoke the power of the federal courts to decide the constitutionality of an Act of Congress. Furthermore, appellee's real objection goes not to the statute that Congress enacted, but rather to the actions of third parties and the possibility that they might attribute to the term "political propaganda" a meaning contrary to that intended by Congress.¹³

In holding that appellee's allegation of a "chilling effect" sufficed to give him standing, the district court's decision is also inconsistent with *Laird v. Tatum*, 408 U.S. 1 (1972). There, this Court recognized that a plaintiff "who alleges that the exercise of his First Amendment rights is being chilled" does not, "without more," have standing (*id.* at 12). It noted that "in each of the[] cases [in which the Court had considered a "chilling effect" argument], the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging" (*id.* at 11).

¹³ We also note that appellee, despite his allegations of a "chilling effect," in fact exhibited the films even before the district court had entered a permanent injunction (see App., *infra*, 6a n.2).

Thus, while the Court's decisions "fully recognize that governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights," they

have in no way eroded the "established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action" * * *. Allegations of a subjective "chill" are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm * * *.

Id. at 12-14; see also *United Public Workers v. Mitchell*, 330 U.S. 75, 86-91 (1947); *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1378-1380 (D.C. Cir. 1984).¹⁴

The district court sought to avoid these principles on the theory that appellee "is not * * * complaining of a 'chilling effect' on the exercise of his First Amendment rights; he is complaining of a species of censorship" (App., *infra*, 10a). Thus, the court concluded that it is "immaterial" that "the statute is not, by its terms, addressed to [appellee] personally" (*id.* at 12a). However, contrary to the district court's reasoning, no issue of

¹⁴ As Judge Scalia explained in *United Presbyterian Church* (738 F.2d at 1378-1379 (emphasis in original)):

"[C]hilling effect" * * * is foreclosed as a basis for standing by the Supreme Court's holding in *Laird v. Tatum* * * *.

All of the Supreme Court cases employing the concept of "chilling effect" involve situations in which the plaintiff has unquestionably suffered some concrete harm (past or immediately threatened) apart from the "chill" itself. * * * "Chilling effect" is cited as the *reason* why the governmental imposition is invalid rather than as the *harm* which entitles the plaintiff to challenge it.

* * * * *

[T]he standing question * * * [is] whether the fear [of a "chilling effect"] constitutes cognizable harm. On th[is] point, *Tatum* is clear and categorical: "[a]llegations of a subjective 'chill' are not . . . adequate."

censorship is involved in this case. No speech has been restrained or prohibited by the government, no sanction or penalty has been imposed for engaging in protected activity, no governmental licensing board has been established, and no content-based regulation or unfettered official discretion serves as a bar to free expression. Compare, e.g., *Cox v. Louisiana*, 379 U.S. 536, 557 (1965); *Laird v. Tatum*, 408 U.S. at 11; *Burstyn v. Wilson*, 343 U.S. 495, 503-505 (1952); *Near v. Minnesota*, 283 U.S. 697, 713-714, 716-717 (1931). Rather, this case involves a classic "chilling effect" argument that is controlled by *Laird v. Tatum*.¹⁵

CONCLUSION

Probable jurisdiction should be noted. Because the decision of the court below is patently erroneous, we suggest that the Court should reverse summarily.

Respectfully submitted.

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JANUARY 1986

¹⁵ In *Block v. Smith*, 583 F. Supp. 1288 (D.D.C. 1984), appeal pending No. 84-5318 (D.C. Cir. argued Feb. 12, 1985), suit was brought by plaintiffs who, like appellee, are prospective exhibitors of these three Candian movies and seek to challenge the constitutionality of the statutory term "political propaganda." The district court dismissed the action for lack of standing. While there may be some differences in the allegations of standing in *Block* and the present case, each court noted its disagreement with the other's ruling. See 583 F. Supp. at 1296 & n.10; App., *infra*, 13a.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV.S-83-287 RAR

BARRY KEENE, PLAINTIFF,

v.

EDWIN MEESE,* ET AL., DEFENDANTS.

[Filed Sept. 12, 1985]

MEMORANDUM AND ORDER ON CROSS-
MOTIONS FOR SUMMARY JUDGMENT

The above-entitled matter came on specially for hearing by way of the parties' cross-motions for summary judgment on August 8, 1984. John G. Donhoff, Esq., appeared as counsel for the plaintiff, BARRY KEENE, and David J. Anderson, Esq., United States Department of Justice, appeared as counsel for the defendants, EDWIN MEESE, et al. Having read and considered the briefs and arguments

* The Court substitutes Edwin Meese as successor to the original defendant, William French Smith, pursuant to F.R. Civ.P. 25.

presented by respective counsel, the Court herein renders its decision on the various motions.

PROCEDURAL AND FACTUAL BACKGROUND

The present action challenges the constitutionality of the Foreign Agents Registration Act, 22 U.S.C. § 611(j)(1), which employs "political propaganda" as a term of art to describe every sort of communicative or expressive medium intended or reasonably adapted to influence persons within the United States with respect to the foreign or domestic policies of a foreign government, the foreign policies of the United States, or certain divisive domestic policies of the United States. Specifically, the plaintiff asserts that the use of the phrase "political propaganda" to describe the materials subject to the Act so denigrates the materials that they are made unavailable to plaintiff as a medium for the expression of his own views and that the freedom of speech guaranteed to plaintiff by the First Amendment is, therefore, abridged.

The Foreign Agents Registration Act ("FARA" or "the Act"), 22 U.S.C. § 611, *et seq.*, was enacted in 1938 and amended in material respects in 1942 and 1966. Act of June 8, 1938, ch. 327, 52 Stat. 631 (1938); Act of April 29, 1942, ch. 263, 56 Stat. 248 (1942); Pub. L. No. 89-486, 80 Stat. 244 (1966). As originally enacted, the intent of the statute was to shine "the spotlight of pitiless publicity" on agents of foreign governments present in the United States who "foster un-American activities, and . . . influence the external and internal policies of this country" and thus to deter "the spread of pernicious propaganda." H.R. Rep. No. 1381, 75th Cong., 1st Sess. 2 (1937). Accordingly, the Act requires every "agent of a for-

foreign principal," as defined, to register as such with the Secretary of State. Act of June 8, 1938, ch. 327, § 2, 52 Stat. 632 (1938). It was soon recognized, however, that the mere registration of agents of foreign principals with an obscure subunit of a federal agency in Washington, D.C., would not suffice to apprise the recipients of materials disseminated by agents of a foreign power of the source of such materials. H.R. Rep. No. 1547, 77th Cong., 1st Sess. 4 (1941); *Amending Act Requiring Registration of Foreign Agents: Hearings on H.R. 6045 Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 77th Cong., 1st Sess. 17 (1941). The Act was therefore amended to define "political propaganda," to require all registrants to mark "political propaganda" with a source-disclosure statement, and to require all registrants to deposit two copies of any "political propaganda" with the Library of Congress and one copy with the Attorney General. Act of April 29, 1942, ch. 263, §§ 1, 4, 56 Stat. 248 (1942).

The purpose of FARA has always been, at least in part, to give notice to the recipients of materials produced by, at the direction of, or under the aegis of a foreign government of the source of such materials; it has always been, at least in part, a "sunshine" statute. H.R. Rep. No. 1381, 75th Cong., 1st Sess. 2 (1937). The 1942 amendments included an express statement of the purpose of the Act:

It is hereby declared to be the policy and purpose of this Act to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign gov-

ernments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in light of their associations and activities.

Act of April 29, 1942, ch. 263, § 1, 56 Stat. 248-49 (1942). The 1966 amendments were intended "to strengthen the basic purposes of the original act," H.R. Rep. No. 1470, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S. Code Cong. & Admin. News 2397, 2398, but in rewriting the statute Congress deemed it appropriate to modify the xenophobic tenor of the original Act and to emphasize the "sunshine" aspect of the law. S. Rep. No. 143, 89th Cong., 1st Sess. 5 (1965). Nevertheless, Congress chose to retain the phrase "political propaganda" to describe the materials subject to the labelling requirement of the Act.

Under the Act, "political propaganda" is defined as

[A]ny oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions

22 U.S.C. § 611(j). Section 4 of the Act, 22 U.S.C. § 614, prohibits the dissemination, in the United States, by any registrant, of any "political propaganda" unless the material is "conspicuously marked" at its beginning with a four-component statement. The four components of the required statement are: (1) "the relationship or connection between the person transmitting the political propaganda or causing it to be transmitted and such propaganda," (2) the fact that the supplier of the material is an agent of a foreign principal, (3) the fact that the supplier's registration statement is available for public inspection at the Department of Justice, and (4) that the registration of agents of foreign principals by the United States does not indicate approval by the United States Government of the material. Thus the information required by the disclosure statement seems wholly innocuous, but the obligation to affix such a statement exists only when an agency of the federal government has determined that the materials are "political propaganda."

The National Film Board of Canada has registered with the Attorney General as an agent of a foreign principal since 1947. In 1983, the Registration Unit of the Internal Security Section of the Criminal Division of the United States Department of Justice informed the National Film Board of Canada that three of its films—*If You Love This Planet*, *Acid Rain: Requiem or Recovery*, and *Acid from Heaven*—had been determined to be "political propaganda" within the meaning of the Act and that the Board was therefore obliged to make the disclosure statement "a part of [each] film." See 28 C.F.R. § 5.400(c). Shortly thereafter, the Registration Unit agreed to review its determination and to refrain from imposing the labelling requirement pending the review. Six months

later this Court issued a preliminary injunction addressed to the defendants forbidding them from enforcing the Act with respect to these three films pending ultimate disposition of the action, finding that the plaintiff had raised substantial issues meriting litigation and that the hardship to befall the plaintiff from a denial of a preliminary injunction was significantly greater than the hardship to befall the defendants from a grant of a preliminary injunction. *Keene v. Smith*, 569 F. Supp. 1513 (E.D. Cal. 1983).¹

The defendants are the federal officers charged with the enforcement of the Act. The plaintiff is a citizen of the United States, a member of the State Bar of California, and a member of the California State Senate. Plaintiff has introduced into evidence uncontroverted declarations, *see* 28 U.S.C. § 1741, that he wishes to acquire and exhibit the three Canadian films as part of his participation in the public debate about appropriate governmental policy respecting nuclear weaponry and stationery [*sic*] source emissions and that he is deterred from doing so by the government's characterization of the materials as "political propaganda."² Plaintiff has asked this Court to hold that the use of the phrase "political propaganda" to describe materials subject to the Act abridges his freedom of speech and is, therefore, unconstitutional.

¹ The preliminary injunction did not prohibit the defendants from reconsidering their initial decision that the three films were "political propaganda" within the meaning of the Act. None of the parties to this action, however, has suggested to this Court that such review has mooted the instant litigation.

² Since the issuance of the preliminary injunction, the plaintiff has obtained and exhibited copies of the three films.

DISCUSSION

I

STANDING

At the outset, the Court feels obliged to observe that summary judgment is proper only when a party demonstrates that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law. *Franklin v. Murphy*, 745 F.2d 1221, 1235 (9th Cir. 1984); *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434, 1436 (9th Cir. 1984); *Retail Clerks Union Local 648 v. Hub Pharmacy, Inc.*, 707 F.2d 1030, 1033 (9th Cir. 1983). It is the obligation of the moving party to establish the absence of a genuine issue of material fact. *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1250 (9th Cir. 1982); *Feldman v. Simkins Industries, Inc.*, 679 F.2d 1299, 1305 (9th Cir. 1982). *See Scoggins v. Boeing Co.*, 742 F.2d 1225, 1230 (9th Cir. 1984); *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 901 (9th Cir. 1983). As such, the party opposing the motion is entitled to have all reasonable inferences drawn in his favor, *Aydin Corp.*, *supra*, *Retail Clerks Union Local 648*, *supra*, and need not file counter-affidavits if the moving parties' affidavits are intrinsically insufficient. *Sheet Metal Workers' Int'l Ass'n Local No. 355 v. N.L.R.B.*, 716 F.2d 1249, 1254 (9th Cir. 1983) quoting *Hamilton v. Keystone Tankship Corp.*, 539 F.2d 684, 686 (9th Cir. 1976) (per curiam). On the other hand, when the moving party does proffer competent evidence tending to prove his version of the facts, the nonmoving party must produce competent evidence tending to prove the contrary; he cannot rest on the allegations or denials of his pleadings. *Franklin v. Murphy*, *supra*;

Scoggins v. Boeing Co., *supra*. These principles of summary judgment jurisprudence apply with equal force to issues going to the court's jurisdiction and to issues affecting the ultimate merits of the litigation. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983).

In the present case, the defendants have failed to counter, by affidavit or otherwise, the declarations filed by the plaintiff tending to demonstrate the existence of standing. Instead, defendants have argued that the assertions made by plaintiff are simply insufficient to establish standing and as such defendants are entitled to judgment as a matter of law.

In adjudicating the defendants' motion to dismiss for lack of standing, this Court accepted the relevant allegations of the plaintiff's complaint as true, as it was required to do, *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206 (1975), and concluded that those facts were sufficient to establish standing. *Keene v. Smith*, *supra*, at 1517-19. The plaintiff has now filed declarations tending to prove each of those allegations, declarations uncontradicted in any particular by the defendants. Accordingly, the Court adheres to its original determination that this plaintiff has standing to challenge the legislation at issue.

In order to have standing to litigate a particular dispute, a plaintiff must demonstrate that (1) he has suffered or will suffer imminently some injury, (2) which fairly can be traced to the putatively illegal conduct of the defendants, and (3) which can be remedied by an exercise of the court's power. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 102 S.Ct. 752 (1982). In urging this Court to reconsider its earlier standing adjudication, the defendants have

focused exclusively on the first element of the three-part standing test enunciated in *Valley Forge*, the necessity of an injury-in-fact. The defendants rightly argue that an injury sufficient to confer standing must be concrete, not speculative or hypothetical. Defendants vigorously argue that the injury of which the plaintiff complains is entirely speculative and thus insufficient, relying in large measure on *Laird v. Tatum*, 408 U.S. 1, 92 S.Ct. 2318 (1972).

In *Laird*, the plaintiffs alleged that the otherwise lawful intelligence-gathering operations of the United States Army, chilled their exercise of First Amendment rights because they feared that the defendants might, at some point in the future, make an inappropriate or unlawful use of the data collected. The United States Supreme Court held such allegations inadequate to give the plaintiffs standing. The Court noted that the mere existence of the Army's data-gathering system posed no threat to any cognizable interest of the plaintiffs. Any reduction in First Amendment activities based on the fear of future illegal activity by the government would result from a self-inflicted wound. Similarly, in *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984), the United States Court of Appeals for the District of Columbia Circuit pointed out that a governmental policy that does not threaten a sanction does not work a cognizable injury on the complainant, even if the complainant feels deterred from the exercise of his rights by the policy. *Laird* and *United Presbyterian Church* stand for the proposition that a reluctance to engage in First Amendment protected activity prompted solely by a fear of future governmental malfeasance is not sufficient to confer standing. In absence of a bona fide threat of a sanc-

tion to be visited upon the plaintiff for the exercise of First Amendment rights, the plaintiff is asserting only "ideological objections" to the governmental policy, which, since the federal courts are not "debating societies," see *Valley Forge, supra*, at 472, 102 S.Ct. at 758, is not a basis for standing. *Fish v. Tucson School District No. 1*, 625 F.2d 835 (9th Cir. 1980).

Neither *Laird* nor *United Presbyterian Church* has any application to the instant case. Plaintiff herein is not, contrary to the contentions of the defendants, complaining of a "chilling effect" on the exercise of his First Amendment rights; he is complaining of a species of censorship. See *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 88 S.Ct. 1298 (1968) (a municipal classification scheme that categorizes films as "suitable" or "not suitable" for children on the basis of unconstitutionally vague standards is a form of censorship). A "chilling effect" occurs when an actor is prospectively dissuaded from engaging in First Amendment protected activities by a threat of governmental sanction. Censorship, by contrast, consists of present governmental interference with or suppression of expression. Censorship is a "regulatory, proscriptive, or compulsory" exercise of governmental power, see *Laird, supra*, at 11, 92 S.Ct. at 2324-25, and it is patently absurd to suggest that one whose expression has been censored by the government lacks standing to complain of that censorship.

The distinction between a "chilling effect" occasioned by a unilateral fear of future governmental misconduct, on the one hand, and censorship, on the other, is well-illustrated by *United Presbyterian Church, supra*. In that case, the plaintiffs challenged on numerous theories Executive Order No. 12333, 3 C.F.R. 200 (1982), alleging three types of injury:

a "chilling effect" on prospective First Amendment activities, the threat of being subjected to unlawful surveillance, and present subjection to unlawful surveillance. For reasons discussed above, the Court of Appeals found the second type of injury insufficient because the plaintiffs had not and could not allege an invasion of their rights of the imminence and likelihood necessary. See *Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 1670 (1983). With respect to the third type of injury, however, the Court of Appeals affirmed the dismissal of the complaint only because the allegations were not plead with the requisite specificity, see F.R.Civ.P. 8(a), and because the relief sought bore no relation to the injury alleged. Clearly, had the plaintiffs adequately alleged a *present* invasion of their rights and relief commensurate with that injury, they would have had standing to challenge the Executive Order that purportedly authorized the defendants to engage in the acts complained of.

In the present action, the plaintiff has shown by competent, uncontroverted evidence, that the defendants have determined that three specific films which plaintiff presently desires to use as media for the expression of his own views are "political propaganda" within the meaning of the Act. The plaintiff is not complaining about a self-inflicted wound; rather, he is complaining about present governmental action in highly specific circumstances of immediate consequence to him. Cf. *Allen v. Wright*, 104 S.Ct. 3315, 3326 (1984). Whether the statute in fact constitutes an abridgment of the plaintiff's freedom of speech is, of course, irrelevant to the standing analysis.

That the statute is not, by its terms, addressed to the plaintiff personally is immaterial. The United States Supreme Court has specifically said that "governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights." *Laird, supra*, at 12-13, 92 S.Ct. at 2325. In *Scott v. Rosenberg*, 702 F.2d 1263 (9th Cir. 1983), the Ninth Circuit noted

When a governmental demand "imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not . . . deprive the person harmed of standing to vindicate his rights" if he can establish that "the asserted injury was the consequence of the defendants' actions, or that prospective relief still remove the harm." *Warth v. Seldin*, . . . 422 U.S. [490], 505, 95 S.Ct. [2197], 2208 [(1975)]. . . .

Id. at 1268. Finally, most instructive is *Lamont v. Postmaster General*, 381 U.S. 301, 85 S.Ct. 1493 (1965), wherein the plaintiff challenged a statute which, imposing no sanction whatsoever on the plaintiff, directed the Postmaster General to hold all "communist political propaganda" originating abroad pending assurances from the addressee that he did, indeed, wish to receive the material. Although the statute was directed only to the Postmaster General, not the addressee of the material, the standing of the addressee to challenge the statute was never in question; the effect of the statute was to burden his exercise of his First Amendment rights.

This Court concludes that plaintiff has proved all the facts predicate to standing: the injury he alleges, an abridgment of his freedom of speech, is being caused, if at all, by the present application of the Foreign Affairs Registration Act to specific materials which plaintiff personally wishes to use immediately as part of his discourse with others about the issues raised by the films.³

Obviously, in reaching this conclusion, this Court parts company with its esteemed and learned brother in the district court for the District of Columbia. See *Block v. Smith*, 583 F. Supp. 1288 (D.C.D.C. 1984). In *Block*, the court found that "plaintiffs have not alleged that their rights to . . . exhibit . . . the three films have been interfered with because of the Department of Justice action." *Id.* at 1293. In the present case, however, this is *precisely* the allegation made by the plaintiff. While it is true that the plaintiff herein alleges that the interference is accomplished by mere indirection, nonetheless, inter-

³ The defendants' argument that the plaintiff's status as a legislator is insufficient to confer standing is wholly irrelevant. This Court has never understood the plaintiff to be asserting that his status as a legislator, *per se*, gave him standing to challenge the Act; the First Amendment rights of legislators are neither more nor less extensive than the First Amendment rights of other citizens. The plaintiff's status as a legislator is relevant, if at all, only because it adds a certain piquancy to his claim that the government's conduct burdens his freedom of speech. Since the positions of legislators on matters of public policy are, by design, constantly subject to public scrutiny and periodically subject to constituent approval or disapproval, a legislator is more demonstrably vulnerable to the effects of a governmental policy to denigrate particular media of expression.

ference with speech is exactly what the plaintiff complains of.

In *Block*, the court also found that plaintiffs "could not allege" any interference with their freedom of speech "because the FARA does not prohibit foreign advocacy or place any limitations on the availability or showing of any material deemed to be 'political propaganda.'" *Id.* The plaintiff in the present action, however, contends that FARA *does* place limitations on the dissemination of materials deemed "political propaganda," albeit by the device of official government disparagement of the materials rather than direct proscription. If the observation of the United States Supreme Court in *Laird v. Tatum* that "governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights" is to be given any meaning at all, the fact that the statute does not expressly prohibit or limit dissemination cannot be dispositive on the issue of standing. 408 U.S. at 12, 92 S.Ct. at 2325.

The plaintiff in the present action, like the plaintiffs in *Block*, alleges an injury to his reputation. The plaintiff herein alleges that this injury occurs simply by the application of FARA to the films he wishes to exhibit, whereas the plaintiffs in *Block* apparently alleged that the injury to their reputations occurred by reason of the reporting requirements of the Act. In *Block*, the court found that the allegations of injury to reputation were too speculative to support standing.

The common law doctrine of libel *per se* reflects the common understanding that some statements about a person are inevitably and obviously injurious to reputation; causation is so much a matter of com-

mon knowledge that special damages need not be proved. *See generally*, B.E. Witkin, *Summary of California Law*, "Torts," §§ 280-283 (8th ed. 1974). The plaintiff herein has alleged and proved, via the uncontradicted declaration of Mervin Field, that a statement to the effect that an individual, and particularly a political incumbent, is an exhibitor of films which the United States Department of Justice has found to be political propaganda is such a statement. Such a statement ". . . has a tendency to injure him in his occupation" without regard to context. Cal. Civ. Code §§ 45 and 45a.⁴

The Court emphasizes that the plaintiff herein is not attempting to sue the defendants for defamation. The plaintiff has alleged an injury to his reputation by operation of the statute *only* to demonstrate the indirect way in which the statute abridges his freedom of speech. The statute puts the plaintiff to the Hobson's choice of foregoing the use of the three Canadian films for the exposition of his own views or suffering an injury to his reputation. The Court, having found that the plaintiff has adequately demonstrated the probability and imminence of an injury to reputation occurring by operation of the statute, *cf.*, *City of Los Angeles v. Lyons*, *supra*, must con-

⁴ Under most circumstances, a threatened injury to reputation is not actionable, but not because of the plaintiff's inability to prove causation, or lack of standing. Threatened injuries to reputation are not generally actionable because the First Amendment forbids prior restraints. *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625 (1931). The vindication of the value of protecting uninhibited public discourse and the consequent derogation of the value of protecting individual reputations is irrelevant to the standing of the individual to complain of the defamation.

clude that the plaintiff has alleged, and now proved, an injury-in-fact sufficient to support standing.

II

FIRST AMENDMENT ABRIDGMENT

This action presents the novel question as to whether the First Amendment imposes any limitations on the power of Congress to choose a word or phrase as a term of art. It is important to note at the outset that the plaintiff is not challenging the power of Congress to require that materials produced by or under the aegis of a foreign government be labelled as to source. Rather, the question presented is whether Congress may, consistent with the Constitution, apply a denigrating phrase to those materials thereby rendering the materials unavailable to American citizens who wish to use the materials as media for personal expression.

A

As an aside, the Court notes that federal courts are courts of limited jurisdiction, and as such, must examine, *sua sponte*, the basis for jurisdiction over any particular dispute. Therefore, although the issue has not been raised by respective counsel, this Court feels impelled to decide whether the present action is justiciable. More specifically, the Court must decide whether the present action is barred by the political question doctrine.

An action may be said to present a non-justiciable political question whenever there is:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and

manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 710 (1962). See generally, Wright, Miller & Cooper, *Federal Practice and Procedure*. Jurisdiction 2d §§ 3534, *et seq.* (2d ed. 1984). The present action raises none of the aforementioned problems.

The resolution of the issue presented by this action—the power of Congress to use any word or phrase it chooses as a term of art—has not been committed to a coordinate branch of government. While it is true that Congress is the supreme lawmaking body, U.S. Const. art. 1, § 1, it is the duty of the courts to invalidate those Congressional enactments violative of the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). By the present action, the plaintiff seeks a determination of the constitutionality of a statute, an object squarely within the jurisdiction of the courts.

For the same reasons, there is no lack of judicially discoverable and manageable standards for resolving the issue. The standard is provided by the First Amendment: "Congress shall make no law . . . abridging the freedom of speech" Opaque though that language may seem to be, courts have never de-

clined to construe and apply the language whenever necessary.

The remaining four indicia of a political question have even less relevance. No "policy determination of a kind clearly for nonjudicial discretion" is entailed in assessing the constitutionality of a statute; the Constitution itself expresses the policy. Evaluating the constitutionality of a statute does not show a "lack of the respect due coordinate branches of government;" it is the pre-eminent duty of the courts. There is no need, unusual or otherwise, for "unquestioning adherence to a political decision already made." The choice of a particular phrase as a term of art is hardly a political decision, and in any event not one requiring unquestioning adherence. Finally, there appears no risk of multifarious pronouncements on the question by the various branches of government. Once the United States Supreme Court has adjudicated the application of the First Amendment to terms of art used in Congressional enactments, the question will be foreclosed.

The Court has chosen to explicate its reasoning on the issue of justiciability because it is acutely concerned that a judgment in favor of the plaintiff might hinder Congress in the performance of its legitimate duty. The business of legislative draftsmanship is, after all, the business of communication and one which can be exceedingly difficult. Indeed, the inherent difficulties of communication may be the most troublesome in the area of legislative draftsmanship, an area in which a special degree of precision and clarity is required. Congress is surely entitled to a generous measure of latitude in matters involving the legitimacy of its expression. Despite its concern, the Court concludes that there is no legitimate basis on

which to decline to adjudicate the issue now presented by the parties' cross-motions for summary judgment.

B

On the issue of abridgment, the Court finds, as a matter of fact, that the phrase "political propaganda," and particularly the word "propaganda," is a "semantically slanted word." W. & M. Morris, *Harper Dictionary of Contemporary Usage* 501 (1975). In short, the term "propaganda" as used in ordinary speech, is a word of reproach. The Court's finding in this regard is based on the uncontradicted declarations of distinguished experts on American usage and by reference to authoritative works on American usage. For an example of the former, see Plaintiff's Exhibit B, Declaration of Leonard W. Doob, Senior Research Associate and Sterling Professor Emeritus of Psychology, Yale University; see also Plaintiff's Exhibit C, Declaration of Edwin Newman, correspondent for NBC News, author of two books, and dozens of newspaper and magazine articles on American English. See also *Seasongood v. C.I.R.*, 227 F.2d 907, 910-11 (6th Cir. 1955). One example of the latter is provided by *Webster's New World Dictionary of the American Language* (2d college ed. 1970), in which the senses of a word are listed in historical progression. *Id.* at xii. The last listed definition given for "propaganda" is:

3. ideas, doctrines, or allegations so spread; now often used disparagingly to connote deception and distortion.

Id. at 1138. See also *Funk & Wagnalls Standard College Dictionary* 1080 (1973) ("Propaganda is now often used in a disparaging sense, as of a body of

distortions and half-truths calculated to bias one's judgment or opinions.")

The Court further finds, as a matter of fact, that there are dictionary meanings of the word "propaganda" that do not suggest a negative connotation. For example, *The American Heritage Dictionary of the English Language* 1048 (1976) defines "propaganda," when used as a common noun, simply as "the systematic propagation of a given doctrine or of allegations reflecting its views and interests." Consistent with its previous finding, however, the Court finds that these dictionary meanings have little if anything to do with the use of the word "propaganda" in ordinary speech.

Finally, the Court finds that the definition of the phrase "political propaganda" contained in the Foreign Agents Registration Act partakes neither of the usual, negative, sense of the words nor of any of the other possible dictionary meanings. It is a unique construct of the legislative draftsmen. As such, it is relatively unambiguous. Furthermore, the statutory definition of "political propaganda," considered wholly apart from the conventions of ordinary usage, carries no negative connotation.

C

The government argues that, because statutes are, whenever possible, to be construed as constitutional, and because the internal, statutory definition of "political propaganda" is neutral, this Court must conclude that the statute is constitutional. This argument, however, finesses the basis question: is a neutral statutory definition of an otherwise inflammatory phrase dispositive of a constitutional challenge to the use of such a phrase as a term of art?

The venerable canon of statutory construction that a statute is to be construed as constitutional if at all possible is simply not relevant to this case. That principle directs the Court to adopt an interpretation of a statute, even if somewhat strained, that is consistent with the Constitution in preference to an alternative interpretation that is inconsistent with the Constitution. This directive *presupposes* at least two plausible alternative readings of a statute and an independent assessment, by the Court, of the constitutionality of the various readings. It has no application when either interpretation is constitutional, neither interpretation is constitutional, or there are no plausible alternative readings of a statute.

In the instant case, there are no competing plausible interpretations of FARA. Indeed, as noted above, the Act is relatively unambiguous. The plaintiff is not claiming that the statutory definition is unclear, nor is he challenging the application of FARA *by its terms* to the three Canadian films at issue. The plaintiff claims simply that the use by Congress of an inflammatory phrase to designate (or denigrate) clearly protected First Amendment materials abridges his speech. To suggest that the obligation to construe a statute so as to render it constitutional has any application to this question is to indulge in bootstrapping.

Similarly, the cases cited by the government for the proposition that a court is bound by the definitions provided in the statute are inapposite. None of the cases involved a *constitutional* challenge to a statutory definition, much less a constitutional challenge to a term of art. In each of the cases, the court declined an invitation to rewrite a statutory definition to broaden it or narrow it for the benefit of one

of the parties. In each of the cases, the court, when asked to ascertain the meaning of the words of a statute, refused to countenance a reading at variance with the unambiguous intendment of the legislature.

These cases quite obviously have no application to the question raised by the instant litigation. The plaintiff herein is not asking the Court to construe the phrase "political propaganda" as used in FARA so as to render the statute inapplicable to the films he wishes to exhibit. Rather the plaintiff is contending that Congress is without the constitutional power to use the phrase "political propaganda" to describe the materials subject to the statute's labelling requirement, because those materials are "core" First Amendment materials and because the use of such a term abridges his freedom of speech.

In sum, the present case is not a case involving statutory construction but one involving constitutional power. Accordingly, the Court finds the doctrine of statutory construction largely irrelevant and of no assistance in the Court's resolution of the constitutional challenge.

D

There can be no doubt that the materials subject to the Foreign Agents Registration Act are materials protected by the First Amendment. Film is no less protected by the First Amendment than other media of expression. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166, 68 S.Ct. 915, 933 (1948). The films regulated by the Act, *i.e.*, films addressing public policy issues, are among the materials the protection of which is the principal *raison d'être* of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 14, 96 S.Ct. 612, 632 (1976) ("Discussion of public

issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression. . . ."). Finally, regardless of the unavailability of the First Amendment's protections to foreign governments *qua* foreign governments, the plaintiff herein is a citizen of the United States and thus entitled to invoke the First Amendment in challenging the constitutionality of the Act. *See Lamont v. Postmaster General*, 391 U.S. 301, 85 S.Ct. 1493 (1965).

E

On the issue of the meaning of the term "abridgment," the Court, using both historical materials available to it and the decisions of the United States Supreme Court, has nevertheless been unable to uncover any generalized discussion of the meaning of the term. However, the synonyms used by the Court in its First Amendment cases include "restrict," *Bolger v. Youngs Drug Products Corp.*, 103 S.Ct. 2875 (1983), *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2290 (1972), "limit," *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 535, 100 S.Ct. 2326, 2332 (1980), *Brown v. Hartlage*, 456 U.S. 45, 62, 102 S.Ct. 1523, 1533 (1982) (concurrence), "impinge," *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 101 S.Ct. 2176 (1981), *Buckley v. Valeo*, *supra*, at 22, and "burden," *id.* at 44. From these cases, the Court concludes that "abridgment" as used in the First Amendment means neither more nor less than what it ordinarily means: an "abridgment" occurs when a legislative act either suppresses or substantially interferes with speech. As such, the question of possible abridgment is one of an evidentiary nature.

It is possible to argue that the First Amendment, as a limitation on Congressional power, was intended solely to apply to the *objects* of enactments and not to the *form* of enactments. It is likewise possible that the First Amendment was not intended to apply where Congress enacts a statute whose purpose is entirely proper, but which inadvertently burdens speech by the terms in which it is couched. This Court, however, perceives no historical or semantic support for such an argument. It may well be that the First Amendment was drafted in contemplation of direct and express suppressions of speech, but it is unlikely that the framers would have countenanced with equanimity indirect or surreptitious interferences with speech. Cf. generally, *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S.Ct. 1365 (1984). It is difficult to see why a restriction on speech effectuated by the terms in which Congress couches its enactments is less violative of the First Amendment than other indirect restrictions. Finally, the language of the First Amendment is sufficiently sweeping to justify a reading that forbids abridgments of speech, regardless of how they are accomplished.

In any event, this Court concludes that the suppression of speech was part of the intent of Congress in adopting the challenged portion of the Foreign Agents Registration Act.⁵ While it is true that the Act was *primarily* intended as a "sunshine" statute,

⁵ On the appropriateness of considering legislative motive, cf. *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673 (1968) with *Wallace v. Jaffree*, 53 U.S.L.W. 4665 (June 4, 1985). See generally, L. Tribe *American Constitutional Law* § 12-6 (1978).

there can be little doubt that Congress was alarmed about the distribution within this country of materials it regarded as un-American, twisted, and pernicious. H.R. Rep. No. 1381, 75th Cong., 1st Sess. (1937); *Amending Act Requiring Registration of Foreign Agents: Hearings on H.R. 6045 Before Sub-Comm., No. 4 of the House Comm. on the Judiciary*, 77th Cong., 1st Sess. 17 (1941) (statements of L.H.C. Smith, Chief, Special Defense Unit, Department of Justice and Hon. Adolf A. Beale, Jr., Assistant Secretary of State). The "sunshine" aspects of the Act reflects Mr. Justice Brandeis' perspective:

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.

L. Brandeis, *Other People's Money* 62 (National Home Library Foundation ed. 1983), quoted in *Buckley v. Valeo*, 424 U.S. at 61. In this context, "sunshine" is an antidote to that which is evil or injurious. Although a revelation of source as a means of impeaching the persuasive force of any piece of advocacy is wholly legitimate, and, indeed, consistent with the loftiest conceptions of the First Amendment, see *Whitney v. California*, 274 U.S. 357, 377, 47 S.Ct. 641, 649 (1927), the legislative history considered as a whole makes it abundantly clear that Congress enacted the portion of FARA at issue in order to suppress or restrict that which it found abhorrent. Despite its employment of a wholly legitimate means to that end, Congress used the appellation, "political propaganda," which it understood and intended as a term of opprobrium, and by which it intended to discourage or suppress speech.

For all of these reasons, the Court holds that an abridgment within the meaning of the First Amendment occurs whenever there is a suppression of or substantial interference with speech, regardless of the *modus operandi*.

F

With respect to the evidentiary question—does the phrase “political propaganda,” when officially applied by officials of the United States Department of Justice, abridge speech—the Court has little difficulty. The declaration supplied by Mervin Field, neither rebutted nor impeached by the defendants, establishes beyond peradventure of a doubt that whoever disseminates materials officially found to be “political propaganda” runs the risk of being held in a negative light by members of the general public.⁶ See Gallup Study of the Effect of Campaign Disclosures on Adults’ Attitudes Toward Candidates, July, 1984; Plaintiff’s Exhibit A, Declaration of Mervin D. Field, at 3. For this reason, the Court finds that Congress’ use of the phrase “political propaganda” to describe the materials subject to the registration and reporting requirements constitutes a burden on speech by

⁶ The United States Supreme Court had little trouble in concluding that the phrase “communist political propaganda” was disparaging, despite a neutral statutory definition. *Lamont v. Postmaster General*, *supra* at 303, 85 S.Ct. at 1494. (“Communist political propaganda” was defined as materials falling within the definition of 22 U.S.C. § 611(j) and originating from countries with respect to which tariff concessions had been suspended or withdrawn.) *Id.* The neutral statutory definition did not deter the Court from reaching the obvious conclusion that the phrase was pejorative. The Court found that materials to which the Act applied were materials that “the Federal Government says contains the seeds of treason.”

making such materials unavailable to all but the most courageous. Since the exercise of First Amendment rights often requires an act of courage, it is important to note that the courage required by the operation of FARA is not the courage of one’s convictions but the courage to use materials officially censured by the government.

G

To conclude that a particular enactment abridges speech does not conclude the inquiry, for it is well-settled that Congress may, in appropriate circumstances, enact statutes which restrict or suppress speech. *Schenck v. United States*, 249 U.S. 47, 39 S.Ct. 247 (1919). When the enactment affects the discussion of controversial matters of burning public importance, however, the interference with speech must be justified by a compelling state interest. *Buckley v. Valeo*, 424 U.S. at 25, *passim*. See generally, L. Tribe, *American Constitutional Law* § 12-8 (1978).

In arguing for the existence of an overriding governmental interest justifying an interference with speech, the defendants repeatedly advert to the purpose of the statute as a whole: *to inform recipients of advocacy materials produced by or under the aegis of a foreign government of the source of such materials*. The contention that this serves rather than disserves the First Amendment can hardly be gainsaid, but this misses the point. The abridgment of speech occasioned by the Act does not arise from the operation of the statute taken as a whole; it arises from the use of the phrase “political propaganda.” Enactments affecting the freedom of speech must be as narrowly drawn as possible to effectuate

legitimate governmental goals and to minimize the adverse impact on First Amendment rights. *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 540, 100 S.Ct. 2326, 2335 (1980); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783, 98 S.Ct. 1407, 1419 (1978); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1407 (9th Cir. 1985). In the present case, the defendants have proffered no justification compelling or otherwise for the use of the phrase "political propaganda."

One justification for the Court's countenancing the use of such a phrase despite its adverse effect on freedom of speech is that as noted above—the inherent difficulty of drafting a statute. It may plausibly be argued that the drafting of a statute is so difficult that considerable latitude is to be given Congress and that any incidental effect on First Amendment rights is simply a cost to be borne. Ultimately, however, this Court finds this justification not compelling. First, as has already been discussed, Congress understood and intended the phrase "political propaganda" to be derogatory. Employing the phrase "political propaganda" to designate those materials was a wholly gratuitous step designed to express the suspicion with which Congress regarded the materials. Second, at the time Congress originally enacted the statute, the word "propaganda" had long acquired its unsavory connotation.

Derived from this celebrated society, the name *propaganda* is applied in modern political language as a term of reproach to secret associations for the spread of opinions and principles which are viewed by most governments with horror and aversion.

Oxford English Dictionary 1466 (1971), *quoting* Brande, W., A Dictionary of Science, Literature and Art (1842). Third, the negative connotation of the phrase "political propaganda" could have been established by an *objective* standard: the understanding of the community as a whole rather than that of any idiosyncratic individual within the community. However difficult it may be to draft a statute, it is surely not beyond reason to demand that those whose business is communication communicate with their audience in terms of their audience's linguistic conventions. In the present case, Congress chose not so much to flout those conventions as to exploit them. The use of the phrase "political propaganda" reflects neither the best solution to a knotty problem of draftsmanship nor a then-current usage that time has now rendered archaic. It reflects a conscious attempt to place a whole category of materials beyond the pale of legitimate discourse. This is beyond the power of Congress:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187 (1943). *See also, Wallace v. Jaffree*, 53 U.S.L.W. 4665, 4673-76 (June 4, 1985) (O'Connor, concurring).

H

As noted above, plaintiff is not now challenging any part of the Foreign Agents Registration Act

except that portion which incorporates the term "political propaganda" as a term of art. 22 U.S.C. § 611(j). Having previously found that the term "political propaganda" has the purpose and effect of constricting the plaintiffs' freedom of speech by making materials to which the term is applied unavailable to the plaintiff, the Court further finds the phrase "political propaganda" infects § 4 of the Act, 22 U.S.C. § 614, which prescribes the manner in which "political propaganda" is to be treated. For this reason, the Court concludes that it cannot give plaintiff the relief to which he is entitled without declaring *both* §§ 611(j) and 614 unconstitutional.

On the other hand, the Court finds that §§ 611(j) and 614 are wholly severable from the balance of the Act. Accordingly, no portion of this Court's opinion and order are to be considered or regarded as having adjudicated the constitutionality of any other portion of the respective Act. *Regan v. Time, Inc.*, — U.S. —, 104 S.Ct. 3262, 3269 (1984); *United States v. Jackson*, 390 U.S. 570, 585-586, 88 S.Ct. 1209, 1218-19 (1968).

CONCLUSION

Having found that the films which plaintiff wishes to exhibit are, *prima facie*, protected by the First Amendment, that the use of the phrase "political propaganda" in the Foreign Agents Registration Act abridges plaintiff's freedom of speech within the meaning of the First Amendment, and that there is no compelling governmental interest justifying the use of such a phrase,

IT IS HEREBY ORDERED that the plaintiff's motion for summary judgment be GRANTED, and

that the defendants' motion for summary judgment be DENIED; and

IT IS FURTHER ORDERED that the defendants, their agents, servants, employees and attorneys, and all who act in concert with them be, and the same hereby are, permanently enjoined from enforcing any portion of the Foreign Agents Registration Act which incorporates the term "political propaganda" as a term of art. 22 U.S.C. §§ 611(j) and 614(a) (b) and (c).

IT IS SO ORDERED.

DATED: September 12, 1985.

/s/ Raul A. Ramirez
RAUL A. RAMIREZ, JUDGE
United States District Judge

32a

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV-S-83-287-RAR

BARRY KEENE

vs.

EDWIN MEESE, III

To John G. Donhoff
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Sausalito, CA 94965

Scott Keene
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NOTICE

YOU ARE HEREBY NOTIFIED THAT: Judgment was entered in this action on September 13, 1985.

JAMES R. GRINDSTAFF
Clerk

By: /s/ S. Sinander
S. SINANDER
Deputy Clerk

Sacramento, California

Dated: September 13, 1985

33a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CIV-S-83-287-RAR

BARRY KEENE

v.

EDWIN MEESE, III

[Filed Sep. 13, 1985]

JUDGMENT IN A CIVIL CASE

RAUL A. RAMIREZ

- ☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.
- ☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Judgment be and hereby is entered pursuant to the attached Memorandum and Order on Cross-

34a

Motions for Summary Judgment incorporated herein
for reference.

/s/ James R. Grindstaff
Clerk

Date: September 13, 1985

35a

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil Action No. S-83-287-RAR

BARRY KEENE, PLAINTIFF,

v.

EDWIN MEESE, ET AL., DEFENDANTS.

NOTICE OF APPEAL

[Filed Oct. 11, 1985]

Defendants Edwin W. Meese, Attorney General
of the United States, and Joseph E. Clarkson, Chief,
Registration Unit Internal Security Division, Depart-
ment of Justice hereby appeal from the judgment in
the above-captioned case, filed and entered on Sep-
tember 13, 1985. This appeal is taken to the Su-
preme Court of the United States pursuant to 28
U.S.C. 1252.

Respectfully Submitted,

/s/ David J. Anderson
DAVID J. ANDERSON
Attorney
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Washington, DC 20530
Attorney for defendants

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV.S-83-287 RAR

BARRY KEENE, PLAINTIFF,

v.

EDWIN MEESE, ET AL., DEFENDANTS.

[Filed Oct. 29, 1985]

ORDER

Presently pending on this court's law and motion calendar for November 4, 1985 is defendants' motion to alter this court's judgment of September 12, 1985, under F.R.Civ.P. 59(e), or in the alternative, to issue a stay, under F.R.Civ.P. 62(c), pending appeal to the United States Supreme Court. Plaintiff has timely opposed said motion. E.D. Cal. L.R. 230(c). After a review of the moving papers and the file in the above-entitled case, the court now concludes that it will not be materially assisted in its deliberations by oral argument of the respective counsel. Accordingly, this court will order defendants' motions submitted on the moving papers. E.D. Cal. L.R. 230(h).

PROCEDURAL BACKGROUND

On September 12, 1985, this court issued a permanent injunction enjoining the defendants, their agents, servants, employees, and attorneys, and all

who act in concert with them from enforcing any portion of the Foreign Agents Registration Act which incorporates the term "political propaganda" as a term of art under 22 U.S.C. §§ 611(j) and 614(a), (b), and (c). On September 13, 1985, the clerk of the court entered judgment for plaintiff. On September 27, 1985, defendants filed the instant motion. On October 11, 1985, defendants appealed the judgment of this court to the United States Supreme Court pursuant to 28 U.S.C. § 1252.

DISCUSSION

At the outset, plaintiff challenges defendants' motion to alter or amend the judgment as not having been timely filed. Pursuant to F.R. Civ.P. 59(e), "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of judgment." (emphasis added). To compute time, the court refers to F.R.Civ.P. 6(a):

(a) Computation. [Effective on August 1, 1985. See, also, subdivision (a) above.] In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the

aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation

Here, defendants' motion was filed on September 27, 1985. The date of the entry of judgment, September 13, 1985, as well as Saturdays, September 14 and 21, 1985, and Sundays, September 15 and 22, 1985 are excluded under F.R.Civ.P. 6(a). Hence, defendants' motion to alter or amend was timely filed on the tenth day.

I

The decision to alter or amend a judgment is committed to the sound discretion of the district judge and will not be overturned on appeal absent an abuse of discretion. F.R.Civ.P. 59(e). *McCarthy v. Manson*, 714 F.2d 234, 237 (2d Cir. 1983); *Thomas v. Farmville Mfg. Co.*, 705 F.2d 1307 (11th Cir. 1983). See, e.g., *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 685 F.2d 1065, 1071 (9th Cir. 1982).

Defendants propose that this court alter the judgment so that it enjoins defendants from enforcing the Foreign Agents Registration Act, 22 U.S.C. §§ 611(j) and 614(a), (b), and (c), as against the three films in question, namely, *If You Love This Planet*, *Rain: Requiem or Recovery*, and *Acid From Heaven*. Defendants seek such a change because the current order, according to defendants, does not clearly notify them as to what acts are prohibited. Defendants contend the term "political propaganda" runs throughout the statute and could be construed to prohibit any enforcement of the Act. Furthermore, defendants assert the present order does not fit the

constitutional violation established and goes beyond the facts of the case.

This court's memorandum and order of September 12, 1985 rather expansively enjoins defendants "from enforcing any portion of the Foreign Agents Registration Act which incorporates the term 'political propaganda' as a term of art. 22 U.S.C. §§ 611(j) and 614(a), (b), and (c)." F.R.Civ.P. 65(d) states in pertinent part:

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained. . . .

"The basic principle of the federal rule is that those against whom an injunction is issued should receive fair and well-defined notice of what the injunction prohibits." *Transgo Inc. v. AJAC Transmission Parts Corp.*, 768 F.2d 1001, 1022 (9th Cir. 1985). Although a federal court has broad equitable powers to remedy constitutional violations, it must tailor the scope of injunctive relief to fit the nature and extent of constitutional violation established. *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1041 (5th Cir. 1982); *Newman v. Alabama*, 683 F.2d 1312, 1319 (11th Cir. 1982). See, e.g., *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 2558 (1979); *Dayton Bd. of Education v. Brinkman*, 433 U.S. 406, 420, 97 S.Ct. 2766, 2775 (1977).

Having reviewed the memorandum and order of September 12, 1985, this court now determines that its final order was too broadly phrased. The Foreign Agents Registration Act utilizes the language "politi-

cal propaganda" throughout and not only in the constitutionally infected provisions of 22 U.S.C. §§ 611 (j) and 614(a), (b), and (c). Since this court made no ruling on the constitutionality of any other portion of the respect Act, the parameters of this court's order is less than clear. Moreover, this court wishes to remain consistent and limit its permanent injunction to the imposition of the Foreign Agents Registration Act on the three films, as it did in granting plaintiff's motion for a preliminary injunction. *Keene v. Smith*, 569 F. Supp. 1513, 1523 (E.D. Cal. 1983). By such specific limitation this court is persuaded not only will defendants be appraised of the boundaries of the injunction, but the injunction will be tailored more precisely to the nature and extent of the constitutional violation.

For the reasons as set forth herein, this court will order that its memorandum and order, dated September 12, 1985, be modified to delete page 35, lines 4 through 9 and insert the following language in its stead:

IT IS FURTHER ORDERED that the defendants, their agents, servants, employees and attorneys, and all who act in concert with them be, and the same hereby are, permanently enjoined from enforcing the Foreign Agents Registration Act, 22 U.S.C. §§ 611(j) and 614(a), (b), and (c), respectively, as against the films *If You Love This Planet*, *Rain: Requiem or Recovery*, and *Acid From Heaven*.

II

Defendants next request that the court issue a stay, pursuant to F.R.Civ.P. 62(c), pending appeal to the United States Supreme Court. The considerations governing whether a stay should be granted are

threefold: (1) Have the movants established a strong likelihood of success on the merits? (2) Does the balance of irreparable harm favor the movants? (3) Is the public interest served by the grant of the injunction? *Dellums v. Smith*, 577 F. Supp. 1456, 1457 (N.D. Cal. 1984), citing *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 551 (9th Cir. 1977). See also *Lopez v. Heckler*, 713 F.2d 1432, 1436 (9th Cir. 1983). "Stays are sparingly granted. They are a disfavored remedy because they interrupt the ordinary process of judicial review and postpone relief for the prevailing party." *Dellums*, 577 F. Supp. at 1457.

Defendants argue they will be irreparably harmed if the stay is not granted because they are in doubt as to what portions of the Act they are allowed to enforce and may possibly be subject to a contempt citation. Defendants contend plaintiff's only harm will be that of some delay. Furthermore, defendants assert they have a substantial probability of prevailing on the merits as this court did not adopt the defendants' standing argument as presented in *Block v. Smith*, 583 F. Supp. 1288 (D.D.C. 1977) and because the Supreme Court will not find that the term "political propaganda" carries a negative connotation. Lastly, defendants propound that the issuance of a stay will be in the public interest as this court's decision cripples enforcement of the Act which, according to the defendants, serves to inform the public of the source of material disseminated by foreign governments and requires foreign agents to register with the Department of Justice.

The court views defendants' arguments to be meritless and to have been mooted by the disposition of defendants' motion to alter or amend the judgment. First, the court finds that defendants have put forth

no new arguments which would persuade this court to find they have a strong likelihood of prevailing on the merits. Rather, defendants' arguments are a repeat of what was presented and rejected by the court on the parties' cross-motions for summary judgment. Second, the court believes the narrowing of its permanent injunction order eliminates any possibility of irreparable harm befalling the defendants. Third, the court's order in no way impedes the enforcement of the Act and hence a stay pending appeal will not *per se* serve the public interest. Therefore, this court finds that defendants have failed to meet the burden of justifying the issuance of a stay pending appeal in the instant litigation.

For the foregoing reasons, and good cause appearing therefor,

IT IS HEREBY ORDERED that oral argument scheduled on November 4, 1985 for defendants' motion to alter this court's judgment of September 12, 1985, or in the alternative, to issue a stay pending appeal is VACATED and deemed submitted on the moving papers;

IT IS FURTHER ORDERED that defendants' motion to alter is GRANTED to the extent as incorporated herein;

IT IS FURTHER ORDERED that defendants' motion to issue a stay pending appeal is DENIED.

IT IS SO ORDERED.

DATED: October 29, 1985.

/s/ Raul A. Ramirez
RAUL A. RAMIREZ
Judge
United States District Court

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil Action No. S-83-287-RAR

BARRY KEENE, PLAINTIFF,

v.

EDWIN MEESE, ET AL., DEFENDANTS.

NOTICE OF APPEAL

[Filed Nov. 12, 1985]

Defendants Edwin W. Meese, Attorney General of the United States, and Joseph E. Clarkson, Chief, Registration Unit Internal Security Division, Department of Justice hereby appeal from the amended judgment in the above-captioned case, filed and entered on October 29, 1985. This appeal is taken to the Supreme Court of the United States pursuant to 28 U.S.C. 1252.

Respectfully submitted,

/s/ David J. Anderson
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Attorney for defendants

APPENDIX F

UNITED STATES DISTRICT COURT
E.D. CALIFORNIA

No. CIV. S-83-287 RAR

BARKY KEENE, PLAINTIFF,

v.

WILLIAM FRENCH SMITH, ET AL., DEFENDANTS.

Sept. 7, 1983

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

RAMIREZ, District Judge.

On May 23, 1983, the above-entitled matter came on regularly for hearing on plaintiff's motion for a preliminary injunction and defendants' motion to dismiss. Having read and considered the memoranda submitted by counsel, the attachments thereto, the pleadings, and the arguments of respective counsel, the Court herein grants plaintiff's motion for a preliminary injunction and denies defendants' motion to dismiss. The following shall constitute the Court's Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 52(a).

FINDINGS OF FACT

I

The present action challenges the constitutionality of the Foreign Agents Registration Act, 22 U.S.C. §§ 611, *et seq.* inasmuch as plaintiff contends that certain portions of the Act violate the First Amendment to the United States Constitution, which provides in relevant part:

Congress shall make no law . . . abridging the freedom of speech

II

Plaintiff is a member of the California State Senate and a member of the California State Bar. He desires to exhibit three films produced by the National Film Board of Canada which bear the titles, *If You Love This Planet*, *Acid Rain: Requiem or Recovery*, and *Acid From Heaven*. The former addresses the possible state of the earth and society after a nuclear holocaust; the latter two films address the problem of the acidification of atmospheric precipitation by exposure to sulfur dioxide in the air, commonly known as acid rain. Plaintiff alleges he is deterred from exhibiting the films by a statutory characterization of the films as "political propaganda." Plaintiff further alleges that if he were to exhibit the films while they bore such characterization, his personal, political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired.

III

Defendants are, respectively, the Attorney General of the United States and the Chief of the Registra-

tion Unit of the Internal Security Section of the Criminal Division of the United States Department of Justice. Responsibility for the administration and enforcement of the Foreign Agents Registration Act is vested in the Attorney General, who has delegated his authority to an appropriate officer. 28 U.S.C. § 510; 28 C.F.R. § 0.61(b), 28 C.F.R. Part 5 (1982).

IV

Section 2 of the Foreign Agents Registration Act, 22 U.S.C. § 612, requires each "agent of a foreign principal," defined by § 1(c), 22 U.S.C. § 611(c), to register as such with the Attorney General of the United States. The National Film Board of Canada has so registered.

V

Section 4 of the Act, 22 U.S.C. § 614, requires all registrants to supply the Attorney General with two copies of any "political propaganda" intended for dissemination in the United States. "Political propaganda" is defined, in relevant part, as follows:

The term "political propaganda" includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions

22 U.S.C. § 611(j). Section 4 of the Act further prohibits the dissemination, in the United States, by any registrant, of any "political propaganda" unless the material is "conspicuously marked" at its beginning with a four-component statement. The four components of the required statement are: (1) "the relationship or connection between the person transmitting the political propaganda or causing it to be transmitted and such propaganda," (2) the fact that the supplier of the material is an agent of a foreign principal, (3) the fact that the supplier's registration statement is available for public inspection in Washington, D.C., and (4) that the registration of agents of foreign principals by the United States does not indicate approval by the United States of the material.

VI

Section 10 of the Act, 22 U.S.C. § 620, authorizes the Attorney General to adopt regulations to implement the Act. Pursuant to that authority, the Attorney General adopted regulations which authorize slightly different treatment of films:

Unless specifically directed to do so by the Assistant Attorney General, a registrant is not required to file two copies of a motion picture containing political propaganda which he disseminates on behalf of his foreign principal, so long as he files monthly reports on its dissemination. In each such case this registrant shall submit to the Registration Unit either a film strip showing the label required by section 4(b) of the Act or an affidavit certifying that the required label has been made a part of the film.

28 C.F.R. § 5.400(c).

VII

From the materials submitted to the Court, the Court infers that the National Film Board of Canada does not routinely affix the § 4 label to all of the films that it distributes in the United States. Instead, it would appear that the Film Board transmits a list of all of its films to the Registration Unit which then requests copies of the films which the unit believes fall within the statutory definition of "political propaganda." Upon receipt of the requested copies, the unit determines whether any of the films are "political propaganda" within the meaning of the Act. If any film is determined to be "political propaganda," the Registration Unit so informs the Film Board which then must affix the § 4 label to the copies of the film and file the Dissemination Reports required by the Act, 22 U.S.C. § 614(a), 28 C.F.R. § 5.401.

VIII

The procedure described in Paragraph VII was followed by the defendants in evaluating the films *If You Love This Planet*, *Acid Rain: Requiem or Recovery*, and *Acid From Heaven*. On January 13, 1983, defendants notified the National Film Board of Canada that a determination had been made that the films were "political propaganda," and that the Film Board must make the § 4 label "a part of the film[s]," 28 C.F.R. § 5.400(c), and file the appropriate reports, 28 C.F.R. § 5.401.

IX

In March 1983, defendants agreed to review their administrative decision and to refrain from imposing the labelling and reporting requirement of the Act on the films pending that review.

X

Defendant Clarkson, Chief of the Registration Unit, has supplied the Court with an uncontradicted affidavit which establishes that the defendants have consistently interpreted the Act and the regulations to apply only to the registrant. According to the authoritative agency interpretation of the Act and the regulations, plaintiff is free to remove the § 4 label before exhibiting the films.

CONCLUSIONS OF LAW

I

The present action arises under the United States Constitution, and as such, subject matter jurisdiction is predicated on the provisions of 28 U.S.C. § 1331.

A. *Standing*

II

As a general rule, the doctrine of standing may be employed so as . . . "to refuse to determine the merits of a legal claim, on the ground that even though the claim may be correct, the litigant advancing it is not properly situated to be entitled to its judicial resolution." 13 Wright, Miller, & Cooper, *Federal Practice & Procedure* § 3531. Standing implicates the Court's subject matter jurisdiction because the Constitution confers judicial power on the courts only for "cases and controversies." U.S. Const. art. III, § 2, cl. 1; *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). In order to demonstrate standing, a plaintiff must exhibit (1) that he has suffered or will suf-

fer imminently some injury, (2) that the injury can fairly be traced to the challenged conduct, and (3) that the injury can be remedied by an exercise of the court's power. *Id.*

III

In evaluating plaintiff's standing, the Court is required to accept all material allegations of the complaint as true:

For purposes of ruling on a motion to dismiss for want of standing, both the trial court and the reviewing courts must accept as true all material allegations of the complaint, and construe the complaint in favor of the complaining party. [cite] At the same time, it is within the trial court's power to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from all the materials of record, the complaint must be dismissed.

Warth v. Seldin, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975). This does not and will not preclude defendants from filing an answer which denies the allegations and seeking an adjudication of the issue via a motion for summary judgment, *United States v. Students Challenging Regulatory Procedures (SCRAP)*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973), or via trial, *Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission*, 659 F.2d 903 (9th Cir. 1981), *aff'd on other grounds sub. nom. Pacific Gas & Electric Co. v. State Energy Resources Conserva-*

tion & Development Commission, — U.S. —, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983).

IV

Because the federal courts are not to be used as "publicly funded forums for the ventilation of public grievances," *Valley Forge Christian College v. Americans United, Inc.*, *supra*, the injury of which plaintiff complains must be an injury "that is peculiar to himself or to a distinct group of which he is a part, rather than one 'shared in substantially equal measure by all or a large class of citizens.'" *Warth v. Seldin*, 422 U.S. at 499, 95 S.Ct. at 2205." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979).

V

Plaintiff desires to exhibit the films *If You Love This Planet*, *Acid Rain: Requiem or Recovery*, and *Acid From Heaven*, and it is his claim of status as a would-be exhibitor that differentiates him from citizens generally. There can be little doubt that a film exhibitor, especially in a noncommercial context¹, is likely and reasonably to be understood as using the film to communicate the exhibitor's own ideas. Thus a statute which inhibits the exhibitor's ability to exhibit also impinges on the exhibitor's ability to com-

¹ The fact that the plaintiff plans to exhibit the films in a non-commercial context can reasonably be inferred from the four corners of the complaint. The plaintiff is not in the movie business, and his stated reason for wanting to exhibit the films is to influence public opinion on the issues addressed. An amendment to the complaint to make this fact explicit would not, therefore, be unwise.

municate. It is this special impairment on the plaintiff's ability to communicate which constitutes an injury different in kind from that suffered by the public in general.

VI

It is well-settled that the injury of which plaintiff complains must be "distinct and palpable" as opposed to speculative or attenuated. *Warth v. Seldin, supra*. Plaintiff's complaint, when read in light of the affidavits subsequently submitted, adequately alleges an injury that is both real and immediate: exhibition of the films which the statute characterizes as "political propaganda" will brand plaintiff, as an exhibitor, as a purveyor of propaganda, which will have an adverse impact on plaintiff's professional and personal reputation.

In the present case, plaintiff does not complain that he might suffer disfavor from his constituents, colleagues, or prospective clients because they disagree with his position on nuclear weaponry or stationary source emissions. Rather, plaintiff complains that his ability to present his ideas for evaluation on their merits is being impaired by the interjection, into the exchange of ideas, of the characterization of those ideas as "political propaganda" by officials of the United States government. The Court finds, therefore, that plaintiff's injury is real and immediate.

VII

In order to demonstrate standing, plaintiff must adequately allege not only an actual injury, but also an injury which "fairly can be traced" to defendants' conduct. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41, 96 S.Ct. 1917, 1926,

48 L.Ed.2d 450 (1976). Plaintiff has made the requisite showing by alleging that the Act characterizes the films that plaintiff wants to exhibit as "political propaganda," that such a characterization necessarily denigrates the contents of the films and vilifies plaintiff as a purveyor of propaganda, and that as a result of such vilification clients and constituents will peremptorily reject the ideas that plaintiff hopes to communicate.

Defendants argue that plaintiff has not demonstrated that their acts are causing or will cause plaintiff to suffer the injury alleged because there is an independent actor, the public, which intervenes between defendants and the plaintiff's injury. See *Simon v. Eastern Kentucky Welfare Rights Organization, supra*. The Court rejects this argument since the injury of which plaintiff complains is the handicap placed upon him as an entrant into the marketplace of ideas by the statute's opprobrious characterization of plaintiff's chosen medium of expression. If the statute's characterization does indeed handicap plaintiff's ability to communicate his ideas, then it is defendants' enforcement of the statute which is the cause of plaintiff's injury.

VIII

A third prerequisite to a demonstration of standing is that plaintiff complain of an injury which is susceptible of judicial remedy. *Simon v. Eastern Kentucky Welfare Rights Organization, supra*. In this case, plaintiff has asked the Court to enjoin defendants from acting pursuant to an allegedly unconstitutional statute which denigrates the three films at issue. Because it is the statute which is alleged to distort the free exchange of ideas, and because de-

fendants are the federal officials charged with the enforcement of the statute, and because the proper defendants are before the Court, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690, 69 S.Ct. 1457, 1461, 93 L.Ed. 1628 (1949), *Philadelphia Co. v. Simpson*, 223 U.S. 605, 620, 32 S.Ct. 340, 344, 56 L.Ed. 570 (1912), an injunction directed to these defendants will provide plaintiff with the desired relief.

Defendants again argue that an injunction may not provide plaintiff with the relief sought, because his constituents, colleagues, and clients may nevertheless react negatively to his exhibition of the films. This argument is likewise rejected by the Court because defendants fail again to distinguish between plaintiff's willingness to risk the disapproval of his constituents and clients based on the merits of his ideas and his unwillingness to risk their disapproval based on his exhibition of films which defendants have officially branded as "political propaganda." Defendants' argument that an injunction will not remedy the injury because plaintiff's constituents and clients may still disapprove of plaintiff's exhibition of these three films, even without the official characterization as "political propaganda," is irrelevant and quite possibly disingenuous.

IX

While plaintiff has standing to complain that the statute by its terms violates his constitutional rights, he does not have standing to complain of the labeling requirement of § 4 *per se*. The uncontradicted affidavit of defendant Clarkson establishes that plaintiff has no obligation with respect to the label, and that

plaintiff is free to remove the label if he chooses.² Plaintiff is not, therefore, injured in any way whatsoever by the labelling requirement.

B. Sufficiency of the Complaint

X

Plaintiff has stated a cause of action upon which relief can be granted. Indeed, it does not appear that defendants really contend that the complaint

² The Court notes that no reasonable reader of the statute and regulations could have imagined that the recipient of the material was free to remove the label. While the statute clearly places the affirmative obligation to affix the label on the registrant, the statute likewise is intended to assure that ultimate recipient of the material is informed that it originated with an agent of a foreign power. For instance, the statute requires that the label be in the language of the material itself, not the language of the foreign power or of the first-tier recipient. The regulations are even more plain. Section 5.400(c), 28 C.F.R., relieves the registrant of the obligation to supply two copies of every film to the Registration Unit, provided that the registrant demonstrates or certifies that the required label "has been made a part of the film." Section 5.402(e) requires the registrant "to insert at the beginning of a [still or motion picture] a statement which is reasonably adapted to convey to the viewers thereof such information as is required" Since the chief importance of the labelling requirement is obviously to inform viewers of the origins of the film, it is frankly surprising to learn that exhibitors of material covered by the Act may, with impunity, frustrate Congressional intent. However, the Court must defer to a consistently applied agency interpretation of its own regulations, *Ehlert v. United States*, 402 U.S. 99, 105, 91 S.Ct. 1319, 1323, 28 L.Ed.2d 625, and the agency interpretation of its regulations and the statute effectively eliminates this aspect of plaintiff's challenge to the Act.

suffers from any formal defects. The complaint adequately if imperfectly alleges that defendants are the officers to whom enforcement of the Foreign Agents Registration Act is assigned, that they have acted in such a way as to cause plaintiff injury, purportedly under the authority of the Act, and that their conduct is malfeasance, because the Act under which they claim authority violates the United States Constitution. These allegations are sufficient to state a claim for relief.

Defendants' motion to dismiss actually urges this Court to adjudicate the merits of plaintiff's claim, i.e., that the complaint fails to state a claim for relief because the statute under which they act is constitutional. A motion to dismiss for failure to state a claim is not an appropriate vehicle to obtain an adjudication of the constitutionality of a statute. Indeed, a motion for judgment on the pleadings once a response has been filed, *Aldabe v. Aldabe*, 616 F.2d 1089 (9th Cir.1980), or in the alternative a motion for summary judgment would appear to the Court to be the more appropriate of motions available to the defendants under the given circumstances.

C. Preliminary Injunction

XI

An applicant for a preliminary injunction is entitled to relief if he demonstrates either probable success on the merits plus irreparable injury or the existence of serious questions meriting litigation plus a significantly heavier burden of hardships. *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197 (9th Cir.1980).

XII

There can be no question but that the present action raises a substantial question warranting litigation. First, the statute unambiguously implicates freedom of speech, which, in the hierarchy of American values, has pride of place. Second, the statute, by focussing on materials that address issues of public policy, is content-sensitive; content-sensitive statutes have long been held to present the most significant threat to First Amendment rights. *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). Third, the statute, by focussing on materials that address public policy issues, applies to those materials whose protection is the central concern of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 14, 96 S.Ct. 612, 632, 46 L.Ed.2d 659 (1976); *Williams v. Rhodes*, 393 U.S. 23, 32, 89 S.Ct. 5, 11, 21 L.Ed.2d 24 (1968) ("Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.").

XIII

Defendants' argument that plaintiff's action lacks merit because the Foreign Agents Registration Act has previously been found to be constitutional is unpersuasive. The subparts of the Act that have been adjudicated constitutional are not the subparts that are challenged by this action. See, *Attorney General v. The Irish People, Inc.*, 684 F.2d 928 (D.C.Cir. 1982) (duty of agents of foreign principals to register); *United States v. Peace Information Center*, 97 F.Supp. 255 (D.C.D.C.1951) (same); *Attorney General v. Irish Northern Aid Committee*, 346 F.

Supp. 1384 (S.D.N.Y.) *aff'd*, 465 F.2d 1405 (2nd Cir.1972) (duty of agents of foreign principals to make books and records available for inspection). No court has ever held that Congress acted constitutionally when it chose to characterize all materials originating from a foreign source and addressing public policy issues as propaganda. *Cf.*, *Lamont v. Postmaster General*, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965).

XIV

Defendants' contention that the challenged provisions of the Act are constitutional because they advance a compelling public interest is likewise unpersuasive. Defendants identify as compelling Congress' interest in assuring that citizens are given some means of sensibly assessing the credibility of certain materials by requiring the identification of their source. Even assuming *arguendo* that this interest is compelling,³ a proposition about which this Court entertains some doubts, *see*, *Talley v. California*, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960), the Court rejects the argument that branding *all* materials of foreign origin as "political propaganda" advances that interest. Congress could easily have imposed an identification requirement without denigrating the affected materials.

XV

Defendants' contention that the phrase "political propaganda" does not, in fact, denigrate the materi-

³ This Court entertains no doubts that an identification of the source is reasonably likely to assist the reader or viewer in evaluating the weight to be given to a particular piece of advocacy. Indeed, this would seem to be one of the major, unspoken premises of the law.

als to which it is applied must also be rejected. Defendants suggest that the ordinary individual understands that the phrase "political propaganda" is used as often with neutral connotation as it is with a negative connotation. To the extent that this argument is sincere, it is fatuous. "Political propaganda" is ordinarily and commonly understood to mean material that contains half-truths, distortions, and omissions. To characterize a particular expression of political ideas as "propaganda" is to denigrate those ideas.

XVI

Defendants strongly urge the Court to accord great deference to Congress' ability to create a term of art, in this case "propaganda" in a non-pejorative sense. With this proposition, in the abstract, the Court has no dispute. Indeed, in *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 315, 62 L.Ed.2d 199 (1979), the United States Supreme Court noted:

A fundamental canon of statutory construction is that, *unless otherwise defined*, words will be interpreted as taking their ordinary, contemporary, common meaning. *Burns v. Alcala*, 420 U.S. 575, 580-581, 95 S.Ct. 1180, 1184, 43 L.Ed.2d 469 (1975). (emphasis supplied)

There are, however, several reasons why this Court cannot simply defer to the particular Congressional definition which defendants seek to have this Court apply.

XVII

It is well-established that courts must not defer to Congress when adjudicating the constitutionality of

statutes which implicate rights guaranteed by the First Amendment. On the contrary, courts are obliged to subject these statutes to "exacting scrutiny." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 98 S.Ct. 1407, 1421, 55 L.Ed.2d 707 (1978); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 1544, 56 L.Ed.2d 1 (1978); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 783, 82 L.Ed. 1234 (1938).

XVIII

In the instant case, exacting scrutiny leads to the tentative conclusion that Congress did, in fact, intend to denigrate the affected materials by the use of the term "political propaganda". In particular, the legislative history of the Foreign Agents Registration Act prompts the conclusion that Congress used the phrase "political propaganda" in a derogatory sense. The Act was enacted in 1938, "as a result of recommendations of the special committee that was appointed by the Seventy-third Congress to investigate un-American activities." H.R.Rep. No. 1381, 75th Cong., 1st Sess. 1 (1937). Congress knowingly used the word "propaganda" as a term of opprobrium:

Incontrovertible evidence has been submitted to prove that there are many persons in the United States representing foreign governments or foreign political groups, who are supplied by such foreign agencies with funds and other materials to foster un-American activities, and to influence the external and internal policies of this country, thereby violating both the letter and spirit of international law, as well as the democratic basis of our own American institutions of government.

Evidence before the Special Committee on Un-American Activities, disclosed that many of the payments for this propaganda service were made in cash by the consul of a foreign nation, clearly giving an unmistakable inference that the work done was of such a nature as not to withstand careful scrutiny.

As a result of such evidence, this bill was introduced, the purpose of which is to require all persons who are in the United States for political propaganda purposes—propaganda aimed toward establishing in the United States a foreign system of government, or group action of a nature foreign to our institutions of government, or for any other purpose of a political propaganda nature—to register

This required registration will publicize the nature of subversive or other similar activities of such foreign propagandists so that the American people may know those who are engaged in this country by foreign agencies to spread doctrines alien to our democratic form of government, or propaganda for the purpose of influencing American public opinion on a political question.

. . . .

We believe the spotlight of pitiless publicity will serve as a deterrent to the spread of pernicious propaganda. We feel that our people are entitled to know the sources of any such efforts, and the person or persons or agencies carrying on such work in the United States.

Id. See generally, H.R.Rep. No. 200, 74th Cong., 1st Sess. (1935), H.R.Rep. No. 1057, 74th Cong., 1st Sess. (1935).

The particular portions of the Act challenged herein were added in 1942, to effectuate the purposes of the Act more directly. See, *Amending Act Requiring Registration of Foreign Agents: Hearing on H.R. 6045 Before Subcomm. No. 4 of the House Comm. on the Judiciary, 77th Cong., 1st Sess.* 17 (Statement of L.M.C. Smith, Chief, Special Defense Unit, Department of Justice) (1941). Congress was still concerned about the problem of "colored and twisted," *id.* at 13, presentations of ideas. H.R.Rep. 1547, 77th Cong., 1st Sess. (1941). Congress defined "political propaganda" broadly, not because it was casting about for a neutral term to describe materials appropriately labelled, but because it was determined to prevent any pernicious publications from escaping the statutory net. *Hearings, supra* at 18. In defining "political propaganda" Congress was trying to describe, clearly and comprehensively, that which it perceived to constitute a threat to the polity, and it used terms which it understood to convey that perception. Congress was acting artlessly when it defined the term "political propaganda."

XIX

Finally, this Court is somewhat troubled by the scope of the deference to Congressional choice urged by the defendants. While it is true that Congress deserves wide latitude for identifying the proper objects of legislation and for delimiting the scope of its enactments, this latitude is not so great as to amount to a license to use language without regard to its commonly accepted and understood meaning. In short, even Congress must ultimately respect the limits of the English language—a language which is generally considered flexible but not infinitely malleable. Con-

gress may not, for instance, claim Humpty Dumpty's prerogative:

"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean,—neither more nor less."

Carroll, Lewis, *Through the Looking Glass* (emphasis in the original). This Court therefore harbors some doubt about the power of Congress to select a term which has a widely understood negative connotation and to designate it as a term of art theoretically having no negative connotation. It may be beyond the power of Congress to determine, for example, that all materials addressing public policy issues and originating from foreign sources shall hereinafter be called "poison" or "obscenity." There are words that cannot be stripped on their nuance. The use of such a word as a term of art is, at least, troubling.

XX

The hardships likely to befall plaintiff from a denial of the preliminary injunction are substantially greater than the hardships to befall defendants from a grant of such relief. The injury of which plaintiff complains is a loss of First Amendment freedoms: every day that the films which plaintiff wishes to exhibit bear the stigma of a characterization as "political propaganda" is a day when the films are unavailable to him as a medium of communication, thus abridging plaintiff's freedom of speech. Beyond peradventure of a doubt, such injury is irreparable. *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Moreover, because of the great value placed on First Amendment freedoms, a loss of freedom of speech would necessarily constitute a grievous hardship. By contrast, no injury to defend-

ants, or to the public interest, has been suggested to the Court. The purpose of the labelling requirement of the Foreign Agents Registration Act is to inform the ultimate viewers of the fact that the films were produced by the National Film Board of Canada. The Court has no reason to suppose that the films which plaintiff wants to exhibit would otherwise lack the identifying information. *See generally*, 17 U.S.C. § 401.

XXI

Having concluded that plaintiff has adequately demonstrated his entitlement to a preliminary injunction under one of the two applicable standards, the Court intimates no view on plaintiff's entitlement to a preliminary injunction under the remaining standard.

XXII

Although plaintiff has no standing to complain of the labelling requirement *per se*, the Court concludes that it is impossible to give plaintiff any effective relief *pendente lite* without exempting the films which plaintiff wants to exhibit from the requirements of the Act. The labelling requirement only has application to those materials termed in the statute "political propaganda." It is the term "political propaganda," however, about which plaintiff complains, and this Court has determined that there is sufficient basis in law and fact to enjoin the defendants from so characterizing the films. Without such a characterization there is no basis for imposing the labelling requirement. The definition of "political propaganda" is an inextricable element of § 4 of the Act, and so long as defendants are enjoined from employing that definition, they must be enjoined from requiring labelling and reports in accordance with § 4.

XXIII

To the extent that any of the foregoing Findings of Fact are deemed to be Conclusions of Law or to the extent that any of the foregoing Conclusions of Law are deemed to be Findings of Fact, the same shall be deemed Conclusions of Law or Findings of Fact as the case may be.

ORDER

For the reasons as set forth herein, IT IS HEREBY ORDERED that defendants, their representatives, agents, servants, employees, attorneys and all persons, agencies, and entities who act in concert with them are forthwith enjoined from imposing any of the requirements of the Foreign Agents Registration Act on the films *If You Love This Planet*, *Acid From Heaven*, and *Acid Rain: Requiem or Recovery* pending the disposition of this action.

IT IS FURTHER ORDERED that pursuant to the provisions of Rule 65(c), F.R.Civ.P., plaintiff shall post security with the Clerk of the Court in the sum of \$1,000.00, said sum to secure payment of any and all costs and damages as may be incurred by defendants if ultimately found to be wrongfully enjoined and/or restrained.

APPENDIX G

STATUTORY PROVISIONS INVOLVED

22 U.S.C. 611 provides in pertinent part:

§ 611. Definitions

As used in and for the purposes of this subchapter—

* * * * *

(b) The term "foreign principal" includes—

(1) a government of a foreign country and a foreign political party;

(2) a person outside the United States, unless it is established that such person is an individual and a citizen of and domiciled within the United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States; and

(3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.

(c) Except as provided in subsection (d) of this section, the term "agent of a foreign principal" means—

(1) any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the

order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal, and who directly or through any other person—

(i) engages within the United States in political activities for or in the interests of such foreign principal;

(ii) acts within the United States as a public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal;

(iii) within the United States solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of such foreign principal; or

(iv) within the United States represents the interests of such foreign principal before any agency or official of the Government of the United States; and

(2) any person who agrees, consents, assumes or purports to act as, or who is or holds himself out to be, whether or not pursuant to contractual relationship, an agent of a foreign principal as defined in clause (1) of this subsection.

* * * * *

(j) The term "political propaganda" includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person

(1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence. As used in this subsection the term "disseminating" includes transmitting or causing to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce or offering or causing to be offered in the United States mails; * * *.

22 U.S.C. 614 provides:

§ 614. Filing and labeling of political propaganda

- (a) Copies to Attorney General; statement as to places, times, and extent of transmission

Every person within the United States who is an agent of a foreign principal and required to register under the provisions of this subchapter and who transmit or causes to be transmitted in the United States mails or by any means or in-

strumentality of interstate or foreign commerce any political propaganda for or in the interests of such foreign principal (i) in the form of prints, or (ii) in any other form which is reasonably adapted to being or which he believes will be, or which he intends to be, disseminated or circulated among two or more persons shall, not later than forty-eight hours after the beginning of the transmittal thereof, file with the Attorney General two copies thereof and a statement, duly signed by or on behalf of such agent, setting forth full information as to the places, times, and extent of such transmittal.

(b) Identification statement

It shall be unlawful for any person within the United States who is an agent of a foreign principal and required to register under the provisions of this subchapter to transmit or cause to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce any political propaganda for or in the interests of such foreign principal (i) in the form of prints, or (ii) in any other form which is reasonably adapted to being, or which he believes will be or which he intends to be, disseminated or circulated among two or more persons, unless such political propaganda is conspicuously marked at its beginning with, or prefaced or accompanied by, a true and accurate statement, in the language or languages used in such political propaganda, setting forth the relationship or connection between the person transmitting the political propaganda or causing it to be transmitted and such propaganda; that the

person transmitting such political propaganda or causing it to be transmitted is registered under this subchapter with the Department of Justice, Washington, District of Columbia, as an agent of a foreign principal, together with the name and address of such agent of a foreign principal and of such foreign principal; that, as required by this subchapter, his registration statement is available for inspection at and copies of such political propaganda are being filed with the Department of Justice; and that registration of agents of foreign principals required by the subchapter does not indicate approval by the United States Government of the contents of their political propaganda. The Attorney General, having due regard for the national security and the public interest, may by regulation prescribe the language or languages and the manner and form in which such statement shall be made and require the inclusion of such other information contained in the registration statement identifying such agent of a foreign principal and such political propaganda and its sources as may be appropriate.

(c) Public inspection

The copies of political propaganda required by this subchapter to be filed with the Attorney General shall be available for public inspection under such regulations as he may prescribe.

MOTION

Supreme Court, U.S.
FILED

MAR 21 1985

JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1180

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

EDWIN MEESE III, ATTORNEY GENERAL OF THE
UNITED STATES, AND JOSEPH E. CLARKSON, APPELLANTS

v.

BARRY KEENE

On Appeal from the United States District Court
For the Eastern District of California

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether the official designation as "political propaganda" of documentary films concerning matters of public interest violates the First Amendment rights to receive and exhibit the films of an elected official who would suffer voter disapproval for having exhibited films which the Federal Government, by its designation, has described as biased and distorted efforts to mislead the public in the interest of a foreign government.

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No. 85-1180

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

EDWIN MEESE III, ATTORNEY GENERAL OF THE
UNITED STATES, AND JOSEPH E. CLARKSON, APPELLANTS

v.

BARRY KEENE

On Appeal from the United States District Court
For the Eastern District of California

MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Supreme Court of the United States, hereby moves this Court to summarily affirm the judgment of the United States District Court, Eastern District of California, for the reason that prior decisions of this Court, followed by the court below, render insubstantial the federal question[s] presented by this appeal.

OPINION BELOW

The Memorandum and Order on Cross-motions for Summary Judgment entered September 12, 1984 and modified October 13, 1985, by the Honorable Raul A. Ramirez of the United States District Court, Eastern District of California, is reported in 619 F. Supp. 1111.

STATEMENT OF THE CASE

This action's procedural history is fully set forth in the trial court memorandum. *Keene v. Meese, supra*, at 1114-1116. Appellee filed suit on March 24, 1983. He alleged that appellants' use of the term "political propaganda" to describe three documentary films produced by the National Film Board of Canada had

erected a barrier to his receipt and exhibition of one or more them. Then Chairman of the California Senate Committee on the Judiciary—now Senate Majority Leader—appellee submitted his own and other declarations testifying to the risk of injury to his reputation and the consequent threat to his re-election that would arise from his exhibiting the films while they were officially classified as foreign “political propaganda.”

On or about May 13, 1983, appellant CLARKSON testified by declaration that the National Film Board of Canada had “requested a reconsideration of the Justice Department’s application of the FARA to the three films and that request is now the subject of discussion between defendants and NFBC.” Clarkson Declaration, at ¶ 3, Def.’s Memo. of Points and Authorities [,] Opp. To Motion for Preliminary Injunction. . . [etc.]. Reconsideration has not been granted.

A consolidated hearing was held on May 27, 1983, on appellee’s motion for a preliminary injunction and appellants motion to dismiss. The court that day denied appellants’ motion to dismiss and granted appellee’s motion for an injunction *pendente lite* prohibiting appellants from designating and regulating the films as “political propaganda.” In September, 1983, the court issued its findings and conclusions. *Keene v. Smith*, 569 F.Supp. 1513.

On August 8, 1984, the parties’ cross-motions for summary judgment were heard. Appellee had submitted additional evidence of injury, notably the results of a national public opinion survey conducted for appellee by the Gallup Organization and designed by Mr. Mervin Field of the Field Institute in San Francisco, California. The survey found that forty-nine percent of voting age adults would be “less inclined” to vote for a state legislative candidate who had sponsored the exhibition of films which appellants had officially determined were foreign political propaganda. Declaration of Mervin Field, *Gallup Study of the Effect of Campaign Disclosures on Adults Attitudes Toward Candidates*, Consolidated Memorandum in Support of Plaintiffs Motion for Summary Judgment. . . [etc.] (hereinafter, Pl.Sum.J.M.), Exhibit A.

The court issued its decision and order granting appellees motion for summary judgment September 12, 1985. The order

was modified and a stay pending appeal was denied October 29, 1985; this appeal followed.

THE QUESTIONS ARE INSUBSTANTIAL

Although the trial court noted that this case “presents the novel question of whether the First Amendment imposes any limitations on the power of Congress to choose a word or phrase as a term of art,” (*Keene v. Meese*, 619 F.Supp 1111, 1120) appellee submits that an unbroken line of decisions of this Court stretching back more than a half-century leaves no room for reasonable doubt concerning the correct resolution of that issue. Those decisions¹ certainly teach that Congress may not direct the Executive to review, classify, and label protected speech according to its quality, like so many hot dogs or sleeping pills.² Accordingly, this Court has consistently struck down content-sensitive schemes aimed at classifying speech, particularly politi-

¹ For a thoroughly researched discussion of the applicable First Amendment case law, see Dorfman [Ann], *Neutral Propaganda: Three Films “Made In Canada” And The Foreign Agents Registration Act*, 7 COMMENT, Hastings Journal of Communications and Entertainment Law, 435, 447-452 and *passim*. The note also contains an extended review of FARA’s legislative history, *id.* at 435-443, enforcement history, *id.* at 443-445, and the instant litigation.

² “[The § 4 label is] not unlike the disclosures . . . required on almost all political advertisements and commercials, or on packages sold at supermarkets.” DeCair [Thomas P., Director of the Justice Department’s Office of Public Affairs], *Justice is Not Censoring Films*, Wash. Post, Mar. 6, 1983, at C7, col. 2. Of course, neither political advertising nor food packaging are officially classified as “propaganda” by any local, state or federal governmental agency.

cal expression, according to the credibility³ or suitability⁴ of its content, or the affiliations of its speakers,⁵ regardless of whether any sanction also attached to its dissemination.

The scheme at issue here represents no less a proscribed governmental intrusion into the free marketplace of ideas. Read in light of the record evidence and stripped of its red herrings, appellants jurisdictional statement asks this Court to permit them to publicly⁶ brand three documentary films about vitally important public issues as mere "political propaganda," unworthy of the consideration or even the attention of the American people. The court below determined, based on substantial, uncontradicted evidence, that classifying the three films as "propaganda" under FARA § 1 would transform appellee's exhibition of the films into an exhibition of foreign political propaganda, harm his reputation with his constituents, and threaten his career. At the very least appellee would be forced to take into account the potential for being attacked as a propagandist by political opponents; addi-

³ *Lamont v. Postmaster General; Fixa v. Heilberg*, 381 U.S. 301 (1965) (invalidating federal statute requiring post office to hold "communist political propaganda"—defined in part by reference to FARA § 1(j)—until its intended recipient requested delivery by returning a card sent to him or her for that purpose.) A unanimous Court, per Douglas, J. (Mr. Justice White not participating), held that the additional burden imposed on those in sensitive employment situations who "might think they would invite disaster if they read what the Federal Government says contains the seeds of treason," *id.* at 307, violated the First Amendment rights of addressees.

⁴ *Eg., Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (invalidating a book review system involving a state commission which communicated its opinion concerning the unsuitability of certain books directly to book sellers, acting as a restraint on dissemination of protected speech.)

⁵ *See, Kliendienst v. Mandel*, 408 U.S. 753, 762-763 (1972) (First Amendment protects receipt of international speech).

⁶ Although appellants imply that the decision to regulate material as propaganda does not become public knowledge (JS, at 20), the § 4(b) identification statement required to be affixed by the agent to any classified material before transmittal certainly serves as a public announcement that the material is being regulated.

tional campaign planning and expenditures would be required to defuse voter disapproval occasioned by the "political propaganda" association. It is inconceivable that such consequences may be tolerated to result from official action absent a persuasive demonstration of necessity.

Appellants, however, have offered no such demonstration; indeed, appellants have offered no justification at all for burdening the receipt and exhibition of the films, much less a compelling interest. To the contrary, appellants' consistent position throughout the litigation has been to deny any interest in regulating distorted or biased information. Appellants have even supported the effort to delete the "political propaganda" language and substitute, in the words of appellants' spokesman, "a more neutral" term.⁷

Having declined to join the issue of Congresses' power to denigrate a targeted category of protected speech, appellants were left to strain against both logic and precedent in casting about for favorable arguments. The opinion below exhaustively demonstrates how thoroughly they failed.

Their jurisdictional statement adds nothing new. Appellants question the court's findings of fact concerning the additional harm that would be done both to the films and to appellee, should the films once again suffer "propaganda" classification. Their attempt to reargue the questions of fact concerning the meaning of "political propaganda" and appellee's injury is not worthy of further consideration. The substantial evidence of injury in the record not only shows appellants to be wrong on the facts, the record lacks any evidence to suggest they may be right.

Lacking evidence, appellants instead assert that the wholly inapposite tenets of statutory construction compel the Court to

⁷ Letter to the Honorable Robert W. Kastenmeir, from Edward C. Schmults, Deputy Attorney General, August 8, 1983, p.3, ¶ 3; Appendix A, *infra*. The letter expressed "the views of the Department of Justice" (*id.*, p. A-1, ¶ 1) regarding Mr. Kastenmeir's proposal to delete FARA §§ 1 and 4 (H.R. 1969, 98th Cong., 1st Sess.; see, *infra*, Appendix B, for current version, reintroduced 99th Cong., 1st Sess.)

ignore the evidence of FARA's interference with the free flow of information because FARA's definition of "propaganda" may apply to any political advocacy material, an argument the trial court dismissed as "bootstrapping." *Keene v. Meese, supra*, at 1122.

Appellee has never contended that the films were incorrectly classified with reference to the Act's provisions, including §§ 1 and 4. Appellants themselves stress that appellee's activities are not subject to FARA regulation, even if he were to remove the § 4 label. SJ, at 20. Consequently nothing about appellee's constitutional challenge to the film's classification calls for the Act to be "construed" or "interpreted":

These [statutory construction] cases quite obviously have no application to the question raised by the instant litigation. The [appellee] . . . is not asking the Court to construe the phrase "political propaganda" as used in FARA so as to render the statute inapplicable to the films he wishes to exhibit. Rather [appellee] is contending that Congress is without the constitutional power to use the phrase "political propaganda" to describe the materials subject [to § 4]

Keene v. Meese, supra, at 1123.

Moreover, as set forth at length in the opinion below, FARA's legislative history compels the conclusion that Congress was concerned with the pernicious effect of foreign propaganda upon the domestic political process during the Second World War. Rather than risk allowing some propaganda to escape regulation, Congress "comprehensively defined" (JS, at 24) the term to assure that virtually all materials disseminated by registered agents would be subject to review. *Ibid*; see also S. Rep. No. 913, 77th Cong., 1st Sess. 9 (1941); H.R. Rep. No. 15547, 77th Cong., 1st Sess. 3, 4-5 (1941). The very breadth of the § 1(j) definition is what has allowed appellants to expand their regulatory efforts beyond true propaganda to include reports on environmental issues⁸ and political movements⁹ produced by respected Canadian

⁸ "Acid Rain: Requiem or Recovery" and "Acid From Heaven".

⁹ "If You Love This Planet".

documentary film makers. Rather than continue to restrict § 4 regulation to ideological tracts and economic puff-pieces,¹⁰ appellants have exploited Congress's broad definition of propaganda to expand the scope of regulation in pursuit of what are widely suspected to be self-serving political goals.¹¹

Appellants' intent—and ultimately Congresses' for that matter—is simply not controlling in respect to the questions presented here. The semantic hair-splitting in which appellants indulge has no bearing at all in determining the harm caused by the "political propaganda" designation.

Whether the use of the phrase "political propaganda" to describe the materials subject to FARA regulation restricts their availability and penalizes their use are questions of fact, not law. The evidence rather than appellants' unsupported speculation about public reaction to the government's propaganda designation demonstrates the imminent risk of injury to the film's credibility and appellee's reputation posed by § 1 classification.¹²

¹⁰ See Exhibit B, Second Declaration of Joseph Clarkson, Def. Memo of Points and Authorities in Support of Motion for Summary Judgment.

¹¹ See e.g., *McGrory, Justice Department's Boos Make Film Subjects Boffo Box Office*, Wash. Post, Mar. 1, 1983, at A3, col. a.

¹² Attempts to limit standing to only those who have already suffered a penalty for engaging in protected activity—or who may rush to court to forestall a threat to penalize their past or present activity—simply fail to recognize the very real injury of restraint upon expression caused by a present fear of prospective harm resulting from either the executory or executed enforcement of a law that is unconstitutional on its face. The difference between restraint and penalty is in this respect the same as that between foresight and hindsight, or two perspectives on the same matter of concern. It follows either that both injuries are cognizable, or neither are, since if the penalty is palpable then the restraint is also, and vice versa. The crucial distinction drawn in the cases in determining if a law abridges expression, if a plaintiff has standing, or both, is that between the restraint or penalty which demonstrably result directly or as the foreseeable consequence of the enactment or its enforcement, and those which lack sufficient documentation of one or more crucial particulars (see e.g., *Laird v. Tatum*, 408 U.S. 1 (1972); cf. *United*

Accordingly, appellants' standing argument is equally unpersuasive. Appellants contend that appellee's standing is based upon his mere "assertion. . . [of] a chain of reasoning [that is] tenuous and remote" (JS, at 27), on no firmer ground than the speculative forecast of a police state alleged in *Laird v. Tatum*, 408 U.S. 1. JS, at 28.

In fact, however, appellee painstakingly documented his material allegations of harm so as to demonstrate that "he has sustained or is immediately in danger of sustaining a direct injury as the result" (*Laird v. Tatum*, *supra*, at 12) of the films' classification. Appellants deal with the evidence by ignoring it; they fail even to argue that appellee's evidence is immaterial or insufficient. Given the utter lack of contradictory evidence in the record, further discussion about the sufficiency of the evidence should be foreclosed on appeal as a matter of law.

In respect to the different result on standing reached in *Block v. Smith*, 583 F.Supp 1288 (D.D.C. 1984), appeal pending No. 84-5318 (D.C. Cir., argued Feb. 12, 1985), significant differences in the circumstances confronting appellee and the appellants in *Block*, as well as important distinctions in the type and amount of evidence of injury in the records of the two cases, serve to reconcile the two decisions on their facts:

In contrast to [appellee's] situation, the *Block* plaintiffs were unable, at least to Judge Richey's satisfaction, to demonstrate a connection between public disapproval of foreign propagandists and any concrete harm that would befall them should they exhibit the films. Part of the difficulty in this regard. . . was the lack of empirical data to support [plaintiffs'] allegation that the public would view *them* less favorably as the result of the § 4 language. But the plaintiffs' principal difficulty seems to have been that even if Judge Richey had assumed the pejorative meaning of § 4, and [had] assumed a negative public reaction as the result of the films characterization by defendants, he was unable to determine [from the evidence] how such a reaction could result

Presbyterian Church in the USA v. Reagan, 738 F2d 1375, (D.C. Cir. 1984).

in a specific and concrete injury to the commercial film distributor or the organizations before him in that case. Moreover, the Court there was not faced with the declaration by plaintiffs that, because of the risk of adverse public opinion attendant in exhibiting the film while classified as "political propaganda", the plaintiffs would be forced to forego exhibition. . . .

[Appellee] here, however, as set forth above, has made ample showing of the risk to his political career resulting from adverse public reaction as measured scientifically by the two most respected public opinion sampling organizations in the country. He has also clearly alleged that the risk of showing the films while classified acts as a prior restraint on his use of the films, since he cannot use them if the [appellants'] are allowed to gratuitously denigrate their contents and thus impugn the motives of public officials who, for purposes of political debate and public education, would exhibit them. A more substantial showing of prospective injury cognizable by Article III in a First Amendment case involving federal interference with the marketplace of ideas is hard to imagine, and serves to clearly distinguish the injuries here from those alleged in *Block*.

Pl. Sum. J.M., at 25:21-27:16.

Block being distinguishable, this Court is not faced with conflicting decisions in need of reconciliation.

Finally, it should be noted that the means exist to swiftly reinstate, through Congressional action, appellants' authority to review and regulate material disseminated by registered agents of foreign principals, should this Court affirm the judgment.

Mr. Kastenmeir has reintroduced his legislation to amend FARA, (fn. 7, *supra*.) H.R. 3957, 99th Cong. 1st Sess; *infra*, Appendix B. In addition, the Honorable Bernard Frank and the Honorable Howard Berman have co-sponsored legislation to conform the Act to the constitutional requirements set forth in the opinion below. H.R. 3827, 99th Cong., 1st Sess.; *infra*, Appendix C. Titled the "Free Trade in Ideas Judiciary Amendments of 1985", the later bill would substitute for "political

propaganda" the phrase "advocacy material," and for "propaganda" the term "material." The bill also proposes modest modifications to the § 4 regulations and other minor technical and conforming amendments.

Mr. Schmultz's letter to Mr. Kastenmeir (fn. 7, *supra*) regarding the Departments position on the earlier version of H.R. 3957 suggested substituting a neutral term for the "political propaganda" language. The Administration is therefore already on record with Congress in support of the substantive thrust of HR 3827. Consequently, lobbying Congress for passage of that legislation would not involve a change in position. If enacted, the constitutional defect determined by the trial court to exist in current law would be removed, while leaving undisturbed appellants' authority to review, identify and monitor the political advocacy of registered foreign agents.

CONCLUSION

For the reasons stated above the judgment below should be affirmed summarily and the appeal dismissed for want of a substantial federal question.

Respectfully submitted,

JOHN G. DONHOFF, JR.
Attorney for Appellee,

SENATOR BARRY D. KEENE

March, 1986

Appendix A

Office of the Deputy Attorney General
Washington, D.C. 20530

August 8, 1983

Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil
Liberties and the Administration
of Justice
U.S. House of Representatives
Washington, D.C. 20515

Dear Bob:

This is in response to your letter of April 5, 1983, requesting my comments on H.R. 1969, a bill to amend the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. 611, *et seq.* (FARA or the Act). Rather than comment informally, I feel that a somewhat fuller explanation of the views of the Department of Justice might facilitate consideration of this matter by your Subcommittee.

H.R. 1969 would strike certain terms and subsections from Sections 1 and 4 of the Act including the definitions of "political activities" and "political propaganda" and make certain other conforming changes to the Act. You indicate that your intent in the suggested changes is to eliminate the role of the Justice Department in reviewing and labeling films and other materials transmitted by "agents of a foreign principal" registered under FARA.

H.R. 1969 would eliminate in their entirety the current requirements of § 4(a) and § 4(b) of the FARA that foreign agents must: (1) file with the Attorney General two copies of any works of "political propaganda they have disseminated," along with a report setting forth the "places, times, and extent" of their dissemination; and (2) plainly mark such items of political propaganda with a disclosure statement setting forth identifying information concerning the agency relationship and the registra-

tion statement along with a disclaimer of approval by the United States Government of the content of the political propaganda.

As you know, FARA is a disclosure statute designed to enlighten the public as to the scope of political activities conducted by agents on behalf of foreign principals. We believe that the limited focus of the Act on political activities of a foreign agent is in the public interest. We would oppose elimination of the definition of "political activities," because this would (perhaps unintentionally) eliminate the basis for determining the scope of the Act. Thus, if H.R. 1969 were enacted, § 1(c) of the Act would continue to define an "agent of a foreign principal" in part as a person engaged in "political activities," but there would be no statutory explanation of that term. Similarly, the crucial § 3(d)(1) exemption for persons engaged in commercial and "non-political" activities, which limits the Act's otherwise broad applicability to "public relations counsel," "publicity agents" and "information service employees," would be left in a state of uncertainty. In sum, while we would not oppose the development of a more concise and appropriate definition of political activities (including, for instance, deletion of the current reference to "political propaganda"), we oppose eliminating this definition in its entirety.

The Department would support your proposal to eliminate the specific filing and reporting requirements imposed by § 4(a) of the Act, since the public interest in knowing generally the identity and activities of agents is adequately served by the more general semi-annual reporting requirements of § 2 of the Act.* We would not, however, support the complete elimination of the disclosure "labelling" requirements of § 4(b) of the Act, since we believe that the public does have an important interest in knowing the foreign principal on whose behalf political advocacy materials are being disseminated. For the same reason we cannot support

* In this regard, we do not understand the purpose of the bill's proposed elimination of language in § 2(a)(6) of the Act specifically referring to political activities within their reporting requirements. If the intent is to eliminate the requirement that registrants include disclosure of covered political activities in their semi-annual reports, we would oppose this amendment.

elimination of § 4(e). We would, however, favor amending the Act to permit use of simpler and more neutral language in the disclosure label, to avoid unnecessary negative connotations that may be inferred from the disclosure statement (as, for instance, from the current statement that the United States Government has not approved the contents of the message).

If some kind of labelling requirement is to be retained, it will continue to be necessary to include within the Act a definition of those materials which must be labelled. We believe Congress should, however, consider replacing the broad definition of "political propaganda," which currently defines materials that must be labelled, with a more concise definition, more narrowly focused on the United States political process. We would also support the use of a more neutral term like political "advocacy" or "information" to denominate information that must be labelled.

Admittedly, retention of any kind of a labelling requirement poses a difficult legislative problem in defining precisely what information is subject to the requirement, as well as an enforcement problem for the Department of Justice in construing whatever definition is enacted by Congress. While we would not object to information disseminated by an agent engaged in political activities be labelled as to source, we recognize that this would impose a broader practical burden on agents than a statute requiring source labelling only for political information.

While we believe H.R. 1969 requires some modification, we stand ready to work with you to address the legitimate concerns raised by the application of the Act to the Canadian films.

The Office of Management and Budget advises that there is no objection to the presentation of this report to the Congress from the standpoint of the Administration's program.

Sincerely,

/s/ EDWARD C. SCHMULTS

Appendix B

99th Congress

1st Session

H.R. 3957

To amend to Foreign Agents Registration Act of 1938,
as amended (22 U.S.C. 611 et seq.)
to eliminate unconstitutional provisions abridging
the freedom of expression.

In the House of Representatives

December 16, 1985

Mr. Kastenmeier introduced the following bill; which was
referred to the Committee on the Judiciary

A BILL

To amend the Foreign Agents Registration Act of 1938,
as amended (22 U.S.C. 611 et seq.) to eliminate uncon-
stitutional provisions abridging the freedom of expression.

*Be it enacted by the Senate and House of Representatives of the
United States of America in Congress assembled,*

SECTION 1. SHORT TITLE.

This Act may be cited as the "Foreign Agents Registration Act
Amendments Act of 1985".

SECTION 2. CORRECTION OF TERMINOLOGY.

The Foreign Agents Registration Act of 1938, as amended, (22
U.S.C. 611 et seq.) is amended by striking out "propaganda"
each place it appears and inserting "expression" in lieu thereof.

**SECTION 3. ELIMINATION OF FILING AND LABEL-
ING REQUIREMENT.**

(a) In General.—Section 4 of the Foreign Agents Registration
Act of 1938, as amended (22 U.S.C. 614) is amended by striking
out subsections (a), (b), and (c).

(b) Clerical Amendment.—The heading for section 4 of the
Foreign Agents Registration Act of 1938, as amended, is
amended to read as follows:

"Foreign Political Communication for Government
Purposes".

(c) Conforming Amendments.—(1) Section 6 of the Foreign
Agents Registration Act of 1938, as amended (22 U.S.C. 616) is
amended—

(A) in subsection (b) by striking out ", and one copy of
every item of political propaganda filed hereunder,"; and

(B) in subsection (c) by striking out ", copies of political
propaganda,".

(2) Section 7 of the Foreign Agents Registration Act of 1938,
as amended (22 U.S.C. 617) is amended by striking out "sections
4(a), 4(b), and 5" and inserting in lieu thereof "section 5".

(3) Section 8(a)(2) of the Foreign Agents Registration Act of
1938, as amended (22 U.S.C. 618) is amended—

(A) by striking out "or in any statement under section
4(a) hereof concerning the distribution of political propa-
ganda"; and

(B) by striking out "(b)".

(4) Section 11 of the Foreign Agents Registration Act of
1938, as amended (22 U.S.C. 621) is amended by striking out "
including" and all that follows through "distributed".

Appendix C

99th Congress
1st Session

H.R. 3827

To amend the Foreign Agents Registration Act of 1938, as amended, to encourage the free flow of information, and for other purposes.

In The House of Representatives

November 21, 1985

Mr. Frank (for himself and Mr. Berman) introduced the following bill; which was referred to the Committee on the Judiciary.

A BILL

To amend the Foreign Agents Registration Act of 1938, as amended, to encourage the free flow of information, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. Short Title: Reference to the Act.

(a) Short Title.—This Act may be cited as the “Free Trade in Ideas Judiciary Amendments of 1985”.

(b) Reference to the Act.—Except as otherwise expressly provided, whenever in this Act an amendment is expressed in terms of an amendment to a section or other provision, the reference shall be considered to be made to a section or other provision of the Foreign Agents registration Act of 1938, as amended.

Sec. 2. Definitions.

(a) Political Propaganda.—Section 1(j) (22 U.S.C. 611(j)) is amended by striking out “political propaganda” and inserting in lieu thereof “advocacy material”.

(b) Political Activities.—Section 1(o) is amended by striking out “political propaganda” and inserting in lieu thereof “advocacy material”.

SEC. 3. FILING OF ADVOCACY MATERIAL.

(a) Filing of Advocacy Material With Attorney General.—Section 4(a) is amended—

(1) by striking out “political propaganda” and inserting in lieu thereof “advocacy material”; and

(2) by striking out “and a statement duly signed by” and all that follows through “transmittal”.

(b) Labeling of Advocacy Material.—Section 4(b) is amended—

(1) by striking out “political propaganda” each place it appears and inserting in lieu thereof “advocacy material”; and

(2) by striking out “and such propaganda” and inserting in lieu thereof “and such material”; and

(3) by striking out “registered under this Act with the Department of Justice, Washington, District of Columbia, as”; and

(4) by striking out “and address”; and

(5) by striking out “; that, as required by this subchapter, his registration statement” and all that follows through the end of the subsection and inserting in lieu thereof a period.

(c) Communications With Federal Officials.—Section 4(e) is amended—

(1) by striking out “political propaganda” and inserting in lieu thereof “advocacy material”; and

(2) by striking out “the propaganda” and inserting in lieu thereof “the advocacy material”.

(d) Conforming Amendment.—The section heading of section 4 is amended by striking out “Political Propaganda” and inserting in lieu thereof “Advocacy Material”.

SEC. 4. PUBLIC EXAMINATION OF OFFICIAL RECORD.

(a) Retention of Attorney General of Information.—Section 6(a) (22 U.S.C. 616(a)) is amended—

(1) by striking out "all statements concerning the distribution of political propaganda" and inserting in lieu thereof "other information"; and

(2) by striking out "and other statements of" in the second sentence and inserting in lieu thereof "of any other information filed by".

(b) Transmittals To Secretary Of State.—Section 6(b) is amended by striking out "political propaganda" and inserting in lieu thereof "advocacy material".

(c) Transmittals To Other Federal Officials.—Section 6(c) is amended by striking out "political propaganda" and inserting in lieu thereof "advocacy material".

SEC. 5 ENFORCEMENT AND PENALTIES.

(a) Penalties.—Section 8(a)(2) (22 U.S.C. 618(a)(2)) is amended by striking out "or in any statement under section 4(a) thereof concerning the distribution of political propaganda".

(b) Nonmailable Matter.—Section 8 is amended by striking out subsection (d) and redesignating subsections (e) through (h) as subsections (d) through (g), respectively.

SEC. 6. REPORTS TO THE CONGRESS.

Section 11 (22 U.S.C. 621) is amended by striking out "political propaganda" and inserting in lieu thereof "advocacy material".

SEC. 7. SUBVERSIVE ACTIVITIES CONTROL ACT OF 1950.

Section 6 of the Subversive Activities Control Act of 1950 (50 U.S.C. 785) is hereby repealed.

AMICUS CURIAE

BRIEF

MAR 14 1986

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

EDWIN MEESE III, ATTORNEY GENERAL OF THE
UNITED STATES, and JOSEPH E. CLARKSON,
Appellants,

—v.—

BARRY KEENE,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

**BRIEF OF MITCHELL BLOCK, AS PRESIDENT OF DIRECT
CINEMA LIMITED, INC., THE ENVIRONMENTAL DEFENSE
FUND, INC., THE STATE OF NEW YORK, THE BIOGRAPH
THEATER CORPORATION, THE NEW YORK LIBRARY ASSO-
CIATION, THE ENVIRONMENTAL TASK FORCE, INC., AND
THE AMERICAN CIVIL LIBERTIES UNION, *AMICI CURIAE*,
CONCERNING JURISDICTIONAL STATEMENT**

ROBERT ABRAMS
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INTEREST OF AMICI CURIAE¹

Amici Mitchell Block, President of Direct Cinema Limited, Inc., the State of New York, the Environmental Defense Fund, Inc. the Environmental Task Force, Inc., the New York Library Association, and the Biograph Theater Corporation are the distributors or exhibitor-sponsors of the three Canadian films at issue here. In a separate action styled Block v. Smith, 583 F.Supp. 1288 83-672 (D.D.C. 1984), appeal argued, No. 84-5318 (D.C. Cir. Feb. 12, 1985), which challenges the government's statutory and constitutional authority to designate the films as political propaganda, they have alleged and demonstrated concrete economic injury, First Amendment injury by way of diminished audience and improper official denigration of

¹ Letters consenting to the filing of this brief are being lodged with the Clerk of this Court pursuant to Rule 36.2.

the information conveyed by the films, and reputational injury resulting from the stigmatization of those distributing or exhibiting these films as foreign political propagandists. The district court dismissed their action for declaratory and injunctive relief for lack of standing, and plaintiffs' appeal was argued in the United States Court of Appeals for the District of Columbia Circuit (Bork, Scalia, and Wright, JJ.) on February 12, 1985.

The government's appeal in Keene v. Meese, including the request for summary reversal, raises some of the questions presented in Block v. Smith and is likely to resolve, either fully or partially, many of amici's claims. Amici, therefore have a direct and immediate stake in the outcome of this appeal. Because the record in Block is substantially more detailed and complete; because at least some of the Block plaintiffs

have shown clear economic injury;² because Block raises statutory claims which could entirely avoid the need for any constitutional adjudication; and because consideration of the First Amendment issues raised here would be substantially assisted through mature consideration by at least one appellate court prior to this Court's review, amici submit this brief to urge the Court to delay consideration of the government's jurisdictional statement pending resolution of Block v. Smith.

Amicus American Civil Liberties Union is a nationwide nonpartisan organization of over 250,000 members, dedicated to the protection

² So far as the lower court's opinions indicate, State Senator Keene did not attempt to establish economic injury as a result of the designation of the films. By contrast, the evidence in Block establishes lost or deferred sales and rentals, inter alia. See pp.9-10, infra. The Department of Justice concedes that there are "differences in the allegations of standing in Block" and Keene, Jurisdictional Statement ("J.S.") 29.

of the guarantees of the Constitution and the Bill of Rights. This case presents an extraordinary claim by the Solicitor General that the government may engage in the official denigration of filmed documentaries as foreign political propaganda, and of those who disseminate such films as foreign political propagandists -- even if members of the potential audience are deterred from viewing the films as a result of the official designation -- so long as Congress has defined the word "propaganda" in a neutral fashion. Because the ACLU believes that Congress could not pretermitt judicial consideration of the effects of a statute on First Amendment rights by statutory definitional provisions, and because in any event there is no reason to believe that Congress has attempted to do so, we submit this brief amici curiae.

PRELIMINARY STATEMENT

It is axiomatic that this Court must, if it can, avoid the unnecessary or premature adjudication of constitutional questions, and that any necessary constitutional adjudication is aided both by consideration of concrete facts in which such questions are embedded and by mature consideration of such issues by lower courts. E.g., Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1927) (Brandeis, J., concurring); Rescue Army v. Municipal Court, 331 U.S. 549 (1947). The government's suggestion that this Court rush to judgment in this case disregards both those valued principles. The official designation of three documentary films produced in Canada as foreign political propaganda raises important issues that may eventually warrant resolution by this Court. But any such resolution should follow, not precede, the D.C. Circuit's long-

expected decision in Block v. Smith, which may avoid the need for constitutional adjudication entirely; substantially reduce, if not entirely eliminate, the need for consideration of the law of First Amendment standing; and assist in the resolution of any constitutional issues by presenting a considered appellate view. This course is particularly appropriate since the government has not and cannot point to any urgent need for immediate review by this Court.

Alternatively, if the Court determines that immediate review is in order, amici urge the Court to affirm summarily the judgment below.

STATEMENT

Amici do not dispute the statement of facts contained in the jurisdictional statement, although they note that it almost entirely omits the facts contained in the record concerning Senator Keene's standing

and First Amendment injury. Amici offer, in addition, certain facts in Block to demonstrate both that the law of standing will not preclude consideration of the merits of the government's actions, and that the government's discussion of the merits is wholly misguided.

Plaintiffs in Block did not generally challenge the Foreign Agents Registration Act, 22 U.S.C. §611 et seq. ("FARA"), or deny that large portions of it are amply supported by compelling governmental interests. Their limited attack was to the pejorative and stigmatizing designation of films in general, and these films in particular, as foreign political propaganda, and to the required reporting and public dissemination by the Department of Justice of their names as those to whom the films were disseminated. They claimed that the government's actions exceeded statutory authority and violated the

First and Fifth Amendments. They did not sue as citizens claiming an abstract First Amendment right to live in a nation where the government does not go beyond participating in the marketplace of ideas to manipulate that market; such a lawsuit would have been barred by cases such as Valley Forge Christian College v. Americans United, 454 U.S. 464 (1982), as a purely ideological and abstract controversy with the government. In contrast to such a suit, the Block plaintiffs distribute, and have exhibited or seek to exhibit, the particular films the government has used its regulatory power to designate and denigrate as foreign political propaganda. They alleged, and submitted undisputed evidence to prove, that the government's actions concretely injured them in three separate ways: by causing them economic harm, First Amendment harm, and harm to their reputations. Any one of these harms

would be sufficient to permit consideration of the merits.

First, and dispositively, plaintiff Block, the distributor of the film If You Love This Planet, demonstrated concrete economic harm. Undisputed affidavits demonstrated that the government's designation of his film as foreign political propaganda directly caused some people or organizations not to purchase or rent the film who otherwise would have; caused others to defer doing so; and caused additional consequential economic harm.³ Such harm is

³ See, e.g., Block Decl. ¶ 11 (Joint Appendix in Block v. Smith, No. 84-5318 ("J.A.") 91) ("At least six potential customers, librarians ... have told us they are deferring taking the film from us because, although interested in the subject matter, they want to await clarification of the controversy surrounding the film. Other potential customers have said they are not sure they will be able to obtain the film because of all the controversy ..."); Roberts Decl. ¶ 3 (J.A. 192) ("[T]here have been fewer preview requests for the film from public libraries and media centers than ... expected ... because of the considerable fear that has been generated as a result of the designation of this film as foreign political (cont'd next page)

plainly sufficient to establish standing.

See, e.g., Lamont v. Postmaster General, 381 U.S. 301 (1965) (standing established by increased trouble of going to post office to receive mail); Cornelius v. NAACP Legal Defense and Education Fund, 87 L.Ed. 2d 567 (1985) (likely reduction in contributions and increased expenses of solicitation); National Black United Fund, Inc. v. Devine, 667 F.2d 173 (D.C. Cir. 1981) (same).

propaganda.... At least six librarians ... have decided to defer a decision about previewing the film because of the current controversy and fear surrounding it...); Barkman Decl. ¶ 5 (J.A. 83) ("But for [the Justice Department's] designation and the controversy it engendered, the [Rhode Island Library Film] Cooperative would already have purchased and would now possess If You Love This Planet and at least one of the two acid rain films.") As to the time and expense incurred, see Block Decl. ¶ 10 (J.A. 90) ("The classification has also caused Direct Cinema financial injury through the unproductive waste of its employees' time in responding to hundreds of inquiries about the meaning and effect of the classification. For instance, we had to produce and distribute approximately 3,000 flyers to attempt to clarify the legal situation involving the ramifications of the film's designation....") See also Barkman Decl. ¶ 10 (J.A. 85) (economic injury to the Film Cooperative which Block can assert under Secretary of State of Maryland v. Munson, 81 L.Ed. 2d 786 ((1984).)

Second, plaintiffs demonstrated that the government's pejorative designation has and will deter some viewers who otherwise would have seen the films exhibited or distributed by the plaintiffs, and will skew the views of others who are not deterred.⁴ Prior decisions make plain that this First Amendment harm also is sufficient to establish standing. E.g., Lamont v. Postmaster General, 381 U.S. at 307 ("any addressee is likely to feel some

⁴ See, e.g., Shields Decl. ¶ 5 (J.A. 200-01) (designation has effect of "prejudicing attitudes of potential viewers.... The prejudicial predisposition created by such a derogatory designation serves no useful educational purpose, and is an unfair attempt to make up the reader's mind about the work in advance"); Brown Decl. ¶ 10 (J.A. 99) (classification "stigmatizes and denigrates the educational value of the information and views put forward in the films. This classification will adversely affect the perception of the views as to the objectivity and scientific merit of the information presented in the films"); Cleveland Decl. ¶ 10 (J.A. 104) ("The educational content of these films and the validity of the scientific conclusions and studies ... set forth in these films are unfairly and unnecessarily denigrated by ... the classification ..."); Lyons Decl. ¶ 7 (J.A. 162) (designation "creat[es] apprehension in the minds of potential audience members.")

inhibition in sending for literature which federal officials have condemned as communist political propaganda"); Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982) (standing conferred by reasonable likelihood of diminished political support); Young v. American Mini-Theatres, 427 U.S. 50, 78 (1976) (Powell, J., concurring) (governmental action likely to diminish audience causes First Amendment injury); Procunier v. Martinez, 416 U.S. 396, 408-09 (1974) (same); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) (plurality opinion of Burton, J.) (enhanced difficulty of organizations in conveying message); National Black United Fund, Inc. v. Devine, 676 F.2d at 179 ("A rule that substantially impairs the ability of certain groups to convey their message to a desired audience .. effectively 'abridges speech' even if it is not intended to curtail public debate.").

Finally, plaintiffs demonstrated that the application of FARA to the films they distributed or sought to exhibit, and the consequent reporting and public dissemination of their names in that connection, was highly likely to harm their individual or institutional reputations.⁵ As Justice Burton

⁵ See, e.g., Block Decl. ¶ 10, 15-17 (J.A. 91, 93) ("We are therefore stigmatized as distributors of foreign 'political propaganda,' a term which ... undermines our reputation as distributors of high quality films.... I am also greatly concerned that the publicity and stigmatization ... will be damaging to current discussions regarding the potential acquisition of Direct Cinema by another company that does not want such publicity... [M]y reputation and credibility as a high quality filmmaker and distributor has also been injured. Furthermore, my reputation in university and academic circles, where 'propaganda' is shunned and 'education' is valued, has been equally effected ... A number of callers have expressed the veivs to my staff and to myself that we are communists because we are distributing a film which the U.S. government has classified as foreign political propaganda"); Brown Decl. ¶ 7,9 (J.A. 97-99) ("EDF is therefore stigmatized as a purveyor of foreign 'poltical propaganda' a characterization which undermines our credibility as a scientifically responsible, politically independent organization... EDF will be perceived as less independent and scientifically credible in its analysis of the acid rain issue.")

noted for the plurality in Joint Anti-Fascist Refugee Committee, "the touchstone of justiciability is injury ... and the right of a bona fide charitable organization to carry on its work, free from defamatory statements of the kind discussed, is such a right." 341 U.S. at 141. See also Buckley v. Valeo, 424 U.S. 1, 74 (1976) (plaintiffs "need show only a reasonable probability that the compelled disclosure ... will subject them to threats, harassment, or reprisals The proof may include ... specific manifestations of public hostility")

The record in Block also contained uncontradicted expert testimony (and complaint allegations which should have been taken as true for purposes of the motion to dismiss) concerning the effect of designating documentary films as political propaganda on audience size and receptivity to the information conveyed by the films.⁶ Indeed,

defendants have agreed that, whatever

⁶ See, e.g., Doob Decl. ¶ 3 (J.A. 127) ("political propaganda" designation "is pejorative, denigrating ... and stigmatizing...." It implies that the material "communicates hidden or deceitful ideas; that concealed interests are involved; that unfair or insidious methods are being employed; ... and that some manipulation is involved"); Jones Decl. ¶ 2 (J.A. 142) ("propaganda" implies "systematic manipulation, hidden motives, distortion, or deceit"); Newman Decl. ¶ 3, 4 (J.A. 173-74) ("whatever its origin, propaganda has become a 'dirty word.' The general understanding ... is that when something is labeled propaganda, it should be looked at closely and with suspicion. Indeed, calling something propaganda amounts, for all practical purposes, to saying that it is not worth considering, that it is to be dismissed.... Propaganda ... is not a neutral word. It is taken to mean not simply that a particular point of view is being put forward, but that it is being put forward with ulterior motives and as part of an attempt to mislead those to whom the propaganda is directed.")

A recent Wall Street Journal editorial noted that "agents of the Soviet government...don't share or even recognize the Western press's standards of objectively reported fact. If necessary, they will lie....", and suggested that the network should therefore "superimpose an identification line saying 'propaganda'" on Soviet spokesmen. Wall Street Journal, March 5, 1986, at 32. See, to the same effect, the New York Times, June 19, 1984 at A1 col. 4 (an article headlined "Cuba Move Called Propaganda Ploy", quoting Secretary of State Shultz's description of Cuba's release of prisoners to Reverend Jesse Jackson as a "propaganda victory"). See also the statements by President Reagan and other administration officials pejoratively using the term "propaganda" set out as an addendum infra.

Congress' intention, the effect of the designation of films or other materials as political propaganda is pejorative, not neutral. Accordingly, the Department of Justice has not opposed amending FARA's definitional section, 22 U.S.C. §611(j), and the labelling provision, 22 U.S.C. §614, to apply not to "political propaganda" but rather to "political advocacy".⁷

⁷ See Statement of D. Lowell Jensen, Assistant Attorney General, in Canadian Films and the Foreign Agents Registration Act: Oversight Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 98th Cong. 1st Sess. (1983) (J.A. 217, 219) ("[I]t is fair to say that the original act reflected a perceived close connection between political propaganda and subversion. It is this original focus, I believe, and therefore the perjorative [sic] connotations of the phrases 'foreign agent' and 'political propaganda' which has caused misunderstanding over the years"); see also letter of Deputy Attorney General Edward Schmults to Representative Kastenmeier (J.A. 289, 291) ("We would also support the use of a more neutral term [as opposed to political propaganda] like political 'advocacy' or 'information' to denominate information that must be labelled.")

ARGUMENT

I

Consideration of The Jurisdictional Statement Should Be Deferred Pending the D.C. Circuit's Decision in Block v. Smith

There are several sound reasons for deferring consideration of the jurisdictional statement, and no countervailing reasons whatsoever for rushing to judgment, either through noting probable jurisdiction or, as the government suggests, summary reversal.

The two issues raised by the jurisdictional statement are whether the government's designation of the three films violates the First Amendment as applied because of the effect of the official designation of the films as foreign political propaganda, and whether Senator Keene, who is not himself a foreign agent under FARA, has standing to challenge the constitutionality of defendants' actions. J.S. at i. The present record, however, is substantially

less detailed and complete than is the record in Block in demonstrating the concrete harm of deterred audience members caused by that designation, and both the substantive First Amendment issues raised by the application of FARA to these films and the standing issue depend on the establishment of harm and impairment to First Amendment interests.

Thus, whereas Senator Keene asserts that he would not show the films in the absence of an order invalidating defendants' actions, Mitchell Block and his company have incurred lost and deferred sales and rentals -- thereby establishing not only classic economic injury in fact, but precisely the kind of injury (government action preventing the communication of messages from willing speakers to otherwise willing listeners) which the First Amendment was adopted to preclude. See, e.g., Bantam Books v. Sullivan, 372 U.S. 58 (1963); Lamont v.

Postmaster General, supra. Accordingly, as standing should be undisputed in Block, to the extent that the Court seeks to decide the constitutional question posed by the government, the record in Block provides a surer basis on which to do so.

Not only would Block provide a better record for any constitutional adjudication, but it may preclude the need for constitutional adjudication altogether, and would at least afford this Court the benefit of the views of a distinguished appellate panel in deciding a question of first impression.

The Block plaintiffs (but not Senator Keene) claimed that the application of FARA to the three films exceeds statutory authority. As demonstrated to the courts below in detail, Congress never intended that communication which is not subversive -- i.e., designed neither to overthrow the

United States government illegally nor to damage the nation -- would fall within 22 U.S.C. §611 (j)'s definition of "political propaganda". Moreover, even assuming that the films are "propaganda", they are not being transmitted "for or in the interests of a foreign principal" within the meaning of §614. This section applies only to political propaganda transmitted in a foreign principal's political interests, and the undisputed record in Block establishes that the foreign agent (the New York office of the National Film Board of Canada) is distributing these films solely for artistic and commercial, not political, purposes. Acceptance of either of these arguments, of course, would provide an alternative statutory basis for the injunction secured by appellee Keene, and would entirely pretermit the need for this Court's resolution of the constitutional questions here.

Quite apart from the virtues of avoiding unnecessary constitutional adjudication, moreover, are the benefits of having at least one considered appellate view on the statutory, constitutional, and standing issues presented here. Although the statutes governing the Court's mandatory appellate jurisdiction do not provide the flexibility of the Court's discretionary jurisdiction permitting denial of certiorari until an issue has percolated through several courts of appeal, there is certainly no violence done to 28 U.S.C. §1252 by deferring action on the jurisdictional statement in Keene pending the issuance of a closely related decision in Block -- particularly where, as here, even noting probable jurisdiction would not lead to argument before next October at the earliest. The government has sought no stay in this Court; the district court's injunction relates only to these three films

in the Eastern District of California; and the films continue to provide, as they always have, information concerning country of origin and the designation that they were produced and distributed by the National Film Board of Canada, thereby fully satisfying all of the legitimate governmental interests in disclosure.⁸ Under these circumstances, wise and prudent jurisprudence counsels deferring action on the jurisdictional statement until

⁸ There are only two additional governmental interests which the injunction might conceivably be thought to impair. First would be an interest not merely in informing potential audiences that these films are produced by the National Film Board of Canada, but in denigrating them as "political propaganda." Second, the injunction apparently precludes the government from requiring (and thereby receiving) publicly filed reports containing the names of those to whom the films are disseminated, pursuant to 28 C.F.R. 5.401(b). See J.A. 216 (dissemination reporting form). But the legislative history makes plain Congress never sought to further these interests, and the government has not only never asserted them throughout this litigation, but it has also expressly disclaimed them in congressional hearings conducted in response to the Canadian films controversy. See n.7 supra and the hearings and statements cited therein. Both would be illegitimate interests in any event.

a decision, and possible petitions for certiorari, in Block.

II

The Official Designation of the Three Documentary Films as Foreign Political Propaganda Causes Redressable Injury To Film Distributors and Exhibitors Who Are Not Themselves Required to Register As FARA Agents

The government's request for summary reversal ignores both the harms caused by defendants' actions and prior cases holding that such actions violate First Amendment rights. Both the judgment below and the right to relief in Block rest not on any a power of linguistic revision, but on the fact, established in both records, that defendants' actions have actually harmed the First Amendment interests of those distributing, or exhibiting, the three films. With particular reliance on the facts in Block, we briefly demonstrate why the government's arguments that the designation

of films as political propaganda does not violate the First Amendment are in error.⁹

As demonstrated above in detail (pp. 8-16 and nn.3-6), the record in Block establishes that the official designation of the films as political propaganda has had the effect of deterring some viewers from seeing the film who otherwise would have seen it, and has slanted and skewed other viewers' attitudes to the films' content. On that record, therefore, there can be no doubt that First Amendment interests of the distributor and exhibitors were infringed, since

⁹ Block also involves a claim that the requirement of the regulation (not embodied in the statute itself) that the registrant publicly report the names of those to whom films are disseminated violates the First Amendment on its face and as applied. Because the district court in Keene did not consider that portion of defendants' scheme, we do not further address it here, except to note that the present Department of Justice has supported the elimination of all the reporting requirements bottomed on § 614, on the ground that they are simply unnecessary to further any governmental interests. See Letter of Deputy Attorney General Schmults to Representative Kastenmeier, supra n.7.

defendants' actions have impeded the ability of speakers to reach otherwise willing listeners, and impaired the ability of citizens freely to choose between competing ideas.¹⁰

¹⁰ A wide range of governmental restrictions on the free flow of information, falling far short of overt censorship and causing harms to the unrestricted communication between willing speakers and listeners, have routinely been held to violate First Amendment. See, e.g., Pacific Gas & Electric v. PUC, 54 U.S.L.W. 4149 (1986) (requirement of sharing envelope with opponents' speech); Lamont v. Postmaster General, 381 U.S. at 307 (signing for mail); Bantam Books v. Sullivan, 372 U.S. at 64 (designation of books as "objectionable" by state commission); Secretary of State of Maryland v. Munson, supra (solicitation restrictions); Talley v. California, 362 U.S. 60 (1960) (right to anonymous speech). See also Anderson v. Martin, 375 U.S. 399 (1964) (invalidating statute requiring compulsory designation of all candidates' race on ballot); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. at 143 (Black, J., concurring) (designating certain organizations as "Communist" or "subversive" violates First Amendment); id. at 161, 168 (Frankfurter, J., concurring) (such designation deprives liberty and therefore requires due process); American Communication Ass'n v. Douds, 339 U.S. 382, 402 (1950) (suggesting invalidity of hypothetical statute requiring members of political party to wear identifying armbands); Boorda v. SACB, 421 F.2d 1142 (D.C. Cir. 1969), cert. denied, 397 U.S. 1042 (1970) (statute authorizing public designation of (cont'd next page)

Neither of the government's two objections to this conclusion withstands analysis. First, it is of no relevance that the statutory definition of "political propaganda" is neutral on its face. That definition, of course, controls the duties the statute imposes, but it can hardly preclude the courts from determining the effect the statute has in the real world. Thus, in Lamont v. Postmaster General, this Court struck down a statute which had effect of inhibiting access to mail, notwithstanding neutral definitions of the operative statutory terms and the absence of any other indication that Congress had intended to limit communication between speakers and willing listeners. The Court held as a matter of law that "any addressee is likely to feel some inhibition on sending for literature which the federal government has

Communist Party membership invalid).

condemned as 'communist political propaganda'", even through "political propaganda" was defined as it is defined in FARA, 22 U.S.C. § 611(j), and "communist" was neutrally defined as certain unnamed countries as to which certain tariff concessions were suspended. See 381 U.S. at 302-03. Cf. Stone v. Graham, 449 U.S. 39, 41 (1980) (striking down law requiring posting of Ten Commandments notwithstanding disclaimer of religious purpose).

The government's myopic reliance on the statutory definition of "propaganda" is particularly disingenuous since defendants have expressly admitted to Congress that there is a "pejorative connotation of the phras[e] 'political propaganda'...in the public mind"¹¹ and since President Reagan and

¹¹ The Block record also contains undisputed expert testimony concerning the meaning the public drew from the designation, see n.6 supra, as does the record in Keene. See also, e.g., Harper Dictionary of (cont'd next page)

other officials have repeatedly used the term "propaganda" pejoratively, see addendum, infra. The Justice Department has accordingly informed Congress that the administration "would also support the use of a more neutral term like 'advocacy' or 'information'" in place of FARA's "political propaganda" characterization.¹² There is

Contemporary Usage (1975 ed.) ("Propaganda has become and will remain a semantically slanted word"); Funk & Wagnalls Standard College Dictionary (1973 ed.) ("Propaganda is now often used in a disparaging sense, as of a body of distortions and half-truths calculated to bias one's judgment or opinions"); Little Oxford Dictionary of Current English (1962 ed.) (propaganda defined as "(means of) disseminating doctrine, information, etc. in order to promote or injure cause etc.; (esp. misleading) information etc. so disseminated"); Oxford Illustrated Dictionary (1962 ed.) (propaganda defined as "[a]ssociation, organized scheme, for propagation of a doctrine (frequently with implication of bias or falsity, esp. in politics)"; A Dictionary of Contemporary American Usage (1957 ed.) ("Though in origin and history and in its special Roman Catholic sense, propaganda has no unfavorable connotation, in popular usage today it is a derogatory term. It is used to describe the efforts of those whom we regard as enemies to make their creed or policy known and accepted ('Communist propaganda, That's just a lot of propaganda').

¹² See n. 7 supra.

therefore no conceivable justification for the government's complaint that the court was asking Congress for an impossible precision (J.S. 16; see generally J.S. 15-19), or that courts may not determine that statutes have caused injury in fact when that injury flows from the effect of statutes, quite apart from legislative intent. See, e.g., Anderson v. Martin, 375 U.S. at 402 (invalidating statute requiring compulsory designation of all candidates' race on ballot, on ground that even truthful and uniformly applied designations might "decisively influence the citizen").

The government's second response to the showing of the harm caused by the denigrating designation goes essentially to standing: that since FARA imposes no duties on non-registrants it cannot harm their rights. But as the Court long ago held, "It is unrealistic to contend that because the

[government] gave no orders directly to the petitioners to change their course of conduct, relief cannot be granted against what [the government] actually did. We have long granted relief to parties whose legal rights have been violated by unlawful public action, although such action made no direct demands on them." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. at 141 (citing cases). See also Heckler v. Chaney, 84 L.Ed. 2d. 714 (1985) (consumer standing under Food and Drug Act). Since the government's designation has the unlawful effect the Court has repeatedly held actionable in the past, see cases cited at n.10 supra -- an interference with the communication of useful information and political speech -- there is no obstacle to relief. Nor is the harm any less actionable because the term political propaganda does not appear on the label affixed on the films. J.S. at 20. FARA

requires that the label be affixed only when the material comes within the statutory definition of political propaganda; and here, the Department of Justice has made an official determination, and announced to the public at large through press releases and public statements, that the films are indeed "foreign political propaganda".

The dangers posed by setting the government astride the flow of speech as the official arbiter of "political propaganda" have been visible to others besides the courts. Congress, too, has understood that for government to place its thumb on the scales of political discussion, and thereby determine the political forum, is inconsistent with the fundamental principle in our democracy that government must "be responsive to the will of the people", Stromberg v. California, 283 U.S. 359, 369 (1931), and not vice versa. See, e.g., 22

U.S.C. §1461 (barring United States Information Agency from disseminating any information within the United States); FCC v League of Women Voters, 82 L.Ed.2d 278, 295 (1984) (concern that public broadcasters not become "vehicles for government propagandizing"); id. at 310-15 (Stevens, J., dissenting). Emphasizing that governmental responsiveness to popular will is fundamentally inconsistent with governmental creation or manipulation of that will, Justice Jackson warned that the state has neither the duty nor the right under our system of government

to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field, every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.

Thomas v. Collins, 323 U.S. 516, 545 (1944) (Jackson, J., concurring).

Against this presumptive infringement of First Amendment rights, the government advances literally nothing -- not a single compelling or even lesser interest in going beyond source identification to impose official denigration of films as "political propaganda" and stigmatization of film exhibitors as foreign political propagandists by placement of their names in the public record for ready identification. Indeed, in testimony before Congress subsequent to the public furor over the designations here, the Department of Justice conceded that all of its interests could be fully achieved through a neutral, non-pejorative term. See n.7 supra. An infringement on speech which is wholly unnecessary and not supported by any governmental interests Congress has sought to further is plainly unconstitutional.

CONCLUSION

For all the foregoing reasons, disposition of the jurisdictional statement should be deferred pending the D.C. Circuit's decision in Block v. Smith. In the alternative, the Court should summarily affirm, or set this case for briefing and argument in tandem with Block v. Smith, which amici would promptly bring here pursuant to 28 U.S.C. § 1254(1).

Respectfully submitted,

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ADDENDUM

Addendum

The current Administration's derogatory usage of the term "propaganda" supports the view that the term is frequently used pejoratively. The following examples, while illustrative, are hardly exhaustive:

- (1) "President Asserts Allies Want Talks on Nuclear Arms," New York Times, June 11, 1984, at A-1, col. 4 ("Despite Soviet propaganda and attempts at intimidation, NATO has remained unified and strong," Mr. Reagan said.")
- (2) Remarks of President Reagan to a Joint Session of the National Parliament of Ireland, 20 Weekly Comp. Pres. Doc. 833 (June 4, 1984) ("I'm afraid the Soviet response has been disappointing. Rather than join us in our efforts to calm tensions and achieve agreements, the Soviets appear to have chosen to withdraw, and to try to achieve their objective through propaganda, rather than negotiations.")
- (3) "Salvadoran Rightist and Key Sandinista are Barred by U.S.," New York Times, Nov. 30, 1983, at A-1, col. 1 ("A White House official said the Government did not want to give Mr. Borge [Nicaragua's Interior Minister] 'a propaganda platform' in the United States.")
- (4) "Reagan Accuses [National Education Association] of Brainwashing Efforts," New York Times, July 6, 1983, at A-12, col. 1 (President

Reagan accused the N.E.A. of trying to "manipulate curriculum for propaganda purposes," and of being more interested in "frightening and brainwashing American school children" than "fostering learning and stimulating balanced, intelligent debate").

- (5) "U.S. Agency Calls Film it Aided 'Propaganda'", New York Times, June 25, 1983, at A-10, col. 6 (Chairman of National Endowment for the Humanities calling film on Palestinian women produced with NEH funds "propaganda" in plainly derogatory context).

JOINT APPENDIX

(11)
No. 85-1180

Supreme Court, U.S.
FILED
JUL 25 1986
JOSEPH F. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1986

EDWIN MEESE III, ATTORNEY GENERAL OF THE
UNITED STATES, and JOSEPH E. CLARKSON, APPELLANTS

v.

BARRY KEENE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOINT APPENDIX

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JURISDICTIONAL STATEMENT FILED JANUARY 9, 1986
PROBABLE JURISDICTION NOTED APRIL 21, 1986

135-1442
5215

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1180

EDWIN MEESE III, ATTORNEY GENERAL OF THE
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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JOINT APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Docket No. 83-287

BARRY KEENE, PLAINTIFFS

v.

EDWIN MEESE, III, JOSEPH E. CLARKSON, DEFENDANTS

LAWYERS ALLIANCE FOR NUCLEAR ARMS CONTROL,
INTERVENOR & AMICUS CURIAE

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1983		
3-24	1	Complt., for decl & inj rel, no sums issd
	2	Notc of mot for prelim inj., Pts/auth in suppt of mot for prelim inj., Aff in supp of prelim inj Ldg Pro Ord Mot for Prelim Inj, ref to L/C
3-31	3	Proof of serv—USA—3/29/83
4-11		Rec'd cpy of deft appl for cont of hrg and aff
	4	Pltf's resp to mot/cont mot/PI
	5	Deft's appl for cont/hrq
4-12		LDG: ord
		LDG: ord

DATE NR.	PROCEEDINGS
1983	
4-13 6	ORDER: cont mot/PI to 5/23/83 at 9; mot/dism to be set for 5/23/83
4-14 7	Pltf's verification of compl.
4-18 8	Pltf's design of associate cnsi
4-25 9	Deft's notc & mot/dism for 5/23/83 at 9
10	Deft's memo of p/a in oppo to mot/PI and support mot/dism LDG: ord
5- 9 11	Pltf's memo in oppo to deft's mot/dism and in reply to ans to mot/PI
5-16 12	Deft's memo of p/a in reply to oppo to mot/dism
5-20 13	Pltf's declar of H. Bistrin in support of mot/PI
14	Pltf's declar of D. Freed in support of mot/PI
15	Ltr fr E. Capapary to J. Donhoff
16	Declar of D. Peterson
17	Notc & mot/intervene for 6/20/83 at 9 of Sacto Chapter Lawyers Alliance; declar
5-23	MINUTES: deft mot/dism denied; pltf mot/PI grnt; \$1,000 bond to be posted
6-2 18	Reporter's transcript 5/23/83
6-7	Rec'd ltr fr L. Cody re: opinion (ltr sent back to her from Molly this date)
19	Deft's stmnt of no oppo to mot/intervene as amicus curiae
6-13 20	Bond \$1,000 LDG: FofF and CofL and ord PI Rec'd ltr fr J. Donhoff re: publishing opinion

DATE NR.	PROCEEDINGS
1983	
6-15 21	Ltr fr J. Donhoff re: Waiver of LR 109
6-23	Ldg: ORD re amicus brf
7-6 22	ORD perm. amicus curiae by Lawyers Alliance of Nuclear Arms Control
9-7 23	FINDINGS OF FACT & CONCLUSIONS OF LAW: defts . . . enjoined fr imposing any . . . requirements of Foreign Agents Registration Act on the films . . . pending disposition . . . pltf to post security . . . \$1,000.00
9-12 24	Intervenors attys notc address change
9-21 25	ANSWER
10- 6 26	Defts NOTC of APPEAL fr 9/7/83 ord—to l/c w/? re 1292 (b) /valid, etc.
10-12	Dkt fee info to CA; cys cnsi & l/c
11- 7 27	Defts NOTC OF APPEAL fr 9/7/83 ord—appeal to 9th CA (as opposed to #26, which is appeal directly fr D.C. to Supreme Court; 9th CA notified of oversight) ; cy l/c 83-2563
11-14 28	Rptrs transc. hrg 5/23/83
11-17 29	Pltfs NOTC of X-APPEAL to C.A.; ltrs/dkt fee info sent 83-2608
11-23 30	Pltfs Notc/motn for lv to and complt—1/9 Ldg: amd cmplt
12-27 31	Cert cy CA ord disp appeal 83-2563
12-27 32	Defts resp to motn to amd cmplt
1984	
1-6 33	Pltfs attys notc address change Ldg: pltfs prop ord

DATE NR.	PROCEEDINGS
1984	
1-11 34	Defts ans to amd cmplt
1-17 35	Cert cy CA ord dismiss appeal (#83-2608); cy 1/c
1-19 36	ORD: perm. amd cmplt
37	Amd cmplt
4-17 38	Defts notc/motn for st 6/4
39	Defts memo p/a
40	Defts stmt on facts
	ldg: ord grntg SJ
5-9 41	Defts applic for cont. of hrg—ceo
42	Defts aff't good cause
	Ldg: ord (below)
5-11 43	ORDER: cont grnt—mot/SJ cont to 8/6/84 at 9
5-21 44	Defts resp to pltf's applic. for cont.
6-7 45	Pltf's attys notc address/firm change
7-9 46	Pltf's notc/motn for SJ—8/6
47	Pltf's consol. memo
48	Pltf's stmt of facts
	Rec'd Pltf's Exh. A
	Rec'd fr pltf booklet entitled "Gallup Study . . ."
	Ldg: ord prep by pltf
49	Amicus brf suppt pltf's SJ motn & oppo defts motn
7-10 50	Pltf's erratum to memo filed 7/9.
7-23 51	Defts motn for enlrgmt time & cont SH hrg— l/c
	Ldg: ord

DATE NR.	PROCEEDINGS
1984	
7-24 52	ORD: ext time for defts oppo tu 7/27
7-26	Rec'd 7/24 ltr fr atty Brady to RAR
7-27 53	Defts memo oppo pltf's motn
54	Defts oppo to pltf's stmt of material facts
	Ldg: ord
8-2 55	Pltf's ltr brf reply to defts oppo
8-2 56	ORD: reset hrg fr 8/6 to 8/8, 10 am
8-8	MINUTES: motn subm aft hrg
8-29	Rec'd ltr frm cnsl
1985	
3-29 57	Pltf's notc of change of address for atty
58	Pltf's suggestion for subst. of deft
	Ldg: ord
4- 1 59	ORD grnting subst. of Edwin Meese Attorney General of US in place of Wm. French Smith, his predecessor; title of action to be amd
6-28 60	Intervenor's notc of change of address for atty
9-12 61	MEMO & ORD: pltf's mot/SJ be grnted; defts mot/SJ is denied; defts permanently enjoined from enforcing any portion of the Foreign Agents Registration Act which incorporates the term "political propaganda"
9-13 62	JUDGMENT entered 9-13-85; notc mailed
10- 1	Ldg: ord re: enforcement of Foreign Agents Registration Act of 1938
63	Dft notc mot to alter, or in the alternative grant a stay; 10-28 @ 9 (to be renotc'd)

DATE NR.	PROCEEDINGS
1985	
10-7 64	Defts amd note of mot to alter or in the alt grant a stay; 11-4 @ 9
10-11	Rec'd ltr to RAR fro atty Mros re: appeal to US Supreme Court
65	Deft note of appeal to U.S. Supreme Court
10-18 66	Pltfs oppo to defts mot/alter or stay judmt
10-29 67	Defts reply to pltfs oppo to defts mot/alter or stay the judgmt
10-29 68	ORD oral argument set for 11-4 vacated deemed submitted on the moving papers; defts mot/alter is grnted to the extent as incorporated herein; defts mot to issue a stay pending appeal is denied
11-12 69	Defts NOTC OF APPEAL
11-13 70	Plt's bill of costs
71	Pltfs decl of counsel in suppt of cost bill
11-21 72	Transc design & ord form
11-25 73	Govt obj to bill of costs
	LDG: ord
12-2 74	Pltfs note mot to award atty fees; 1-13-86 @ 9
75	Pltfs memo pts/auths in suppt of applic of pltf for atty fees for his cnsl
76	Pltfs decl of Marshall Warren Krause in suppt of fee applic
77	Pltfs decl of cnsl in suppt of fee petn
78	Pltfs decl of Jay-Allen Eisen in suppt of fee award
79	Pltfs decl of Barry Keene in suppt of fee applic of John Donhoff, Jr.

DATE NR.	PROCEEDINGS
1985	
12-13 79	Rec'd 11-27 ltr to Judge Fried from Clerk, US Supreme Court re; ext time to file appeal in US Supreme Court
12-23	Rec'd 12-17 ltr to RAR fro atty Krause re: mot at 10 instead of 9
12-30 80	Defts ex parte applic for an enlargmt of time to resp to pltfs applic for atty fees
81	Defts memo in suppt of defts ex parte applic for an enlargmt of time to resp to pltfs applic for atty fees
	Ldg: ord
12-31	Rec'd 12-27 ltr to RAR fro atty Krause re: motion
1986	
1-6	Rec'd 1-2 ltr to RAR fro atty Krause re: cont of mot for atty fees
1-14	MIN ORD re non-exec. of ldg ord (ldg: 12-30)
82	ORD pltfs mot for atty fees is stayed pending defts appeal to the US Supreme Court. Subsequent to the final resolution of said appeal, pltfs may then renew its mot for atty fees; that defts ex parte applic for an enlargement of time is insofar as incorporated herein
1-21	Rec'd NOTC OF FILING AN APPEAL in the United States Supreme Court; 85-1180, October Term, 1985
2-24	NOTICE: Hrg set before clk of crt on matter of taxation of cost on 3-11-86 @ 10; pltf directed to recalculate wit fees to be subm to clk by 3-7; if cnsl wish to subm on docs filed to notify clk & oppo cnsl

DATE NR.

PROCEEDINGS

1986

- 3-7 83 Rec'd 3-7 ltr to PAS fr Fed Trial Atty Mros re
taxation of costs
- 3-11 MINUTES: Taxation of costs is stayed pending
a decision by the U.S. Supreme Court
- 4-23 Rec'd ltr & certified copy of Supreme Court ord
re noting probable jurisdiction in this case
- 5-19 84 Reporter's transcript of hearing of 8-8-84
Certificate of record to U.S. SUPREME COURT
- 6-6 Rec'd Ltr to Clerk fr US Supreme Court re im-
mediate transmittal of entire record
- 6-9 Transmitted entire record to SUPREME COURT
Certified 549392—all parties notified
Rec'd notification of receipt of clerk's record by
Supreme Court

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil Action No. CIVS-83-287 RAR

BARRY KEENE
State Senator
2032 State Capitol Building
Sacramento, California 95814
(916) 445-3375, PLAINTIFF

v.

WILLIAM FRENCH SMITH
Attorney General of the United States
U.S. Department of Justice
9th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

and

JOSEPH E. CLARKSON
Chief, Registration Unit
Internal Security Section
U.S. Department of Justice
315 9th Street, N.W., Room 100
Washington, D.C., 20530, DEFENDANTS

[Filed Mar. 24, 1983]

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

I. INTRODUCTORY STATEMENT

1. This is a civil action seeking declaratory and in-
junctive relief against the application by defendants of

the labelling and reporting requirements of the Foreign Agents Registration Act (22 U.S.C. §§ 611-621, hereinafter "FARA" or "the Act") and the regulations promulgated pursuant thereto (28 C.F.R. Part 5) to the distribution and exhibition of three films produced by the National Film Board of Canada: *If You Love This Planet*, about the environmental effects of nuclear war; *Acid From Heaven* and *Acid Rain: Requiem or Recovery*, both concerned with contamination of rain water by airborne pollutants (hereinafter "the films"). Plaintiff seeks declaratory and injunctive relief prohibiting defendants from stigmatizing the films as "political propaganda" under section 4 of FARA, from requiring plaintiff to exhibit denigrating labels along with the films, and thereby from improperly associating plaintiff, and his opinions on issues of public importance, with the aims and practices of foreign political propagandists. Plaintiff also seeks a declaration that the provisions of the Act regulating "political propaganda" are unconstitutional on their face.

JURISDICTION

2. This action arises under the First Amendment to the Constitution of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. 1331.

THE PARTIES

3. Plaintiff is a California State Senator, representing the Second Senatorial District, Chairman of the Senate Judiciary Committee, and a member of the California State Bar.

The devastating environmental effects of nuclear war and acid rain are crucial matters of public concern to the people of California and of the United States.

Plaintiff wishes to exhibit one, two or all three of the films. He desires to exhibit them in the California State Capitol for viewing by his staff, other legislative and

state employees, and members of the Legislature. He wishes also to exhibit one or more of them to the general public either at the state Capitol or in other locations. Plaintiff intends thereby to both gather information on these important topics and to stimulate free and open discussion and debate about these problems and their potential solutions.

4. Defendant William French Smith is Attorney General of the United States, responsible for the administration of the Department of Justice and for enforcement of the laws of the United States.

5. Defendant Joseph E. Clarkson is an Assistant Attorney General in charge of the Registration Unit of the Internal Security Section of the Department of Justice. The Registration Unit administers FARA.

BACKGROUND INFORMATION AND EVENTS AT ISSUE

6. FARA requires agents of foreign governments to register as such with the Department, and, among other things, requires that two copies of political propaganda transmitted or caused to be transmitted in interstate commerce by such agents be filed with the Registration Unit within 48 hours of its transmittal, along with a statement "setting forth full information as to the places, times and extent of such transmittal." [22 U.S.C. 614 (a)]

7. Films to be distributed by agents of a foreign government are reviewed by the Registration Unit. Under the Act, the Unit may then label such films "political propaganda." The transmittal and exhibition of political propaganda presented through the means of a motion picture must be fully reported, on a monthly basis, setting forth the time, place and extent of the exhibition or exhibitions.

8. Political propaganda is defined in the Act, among other things, to mean: "any oral, visual, graphic, writ-

ten, pictorial or other communication or expression by any person (1) which is reasonably adapted to or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States. . . ." [22 U.S.C. 611(j) ; emphasis added]

9. Political propaganda presented through means of a motion picture must include at the beginning of the film a statement "setting forth the relation or connection between the person transmitting the political propaganda or causing it to be transmitted and such propaganda; that the person transmitting such political propaganda or causing it to be transmitted is registered under this subchapter with the Department of Justice . . . as an agent of a foreign principal, together with the name and address of such agent of a foreign principal and of such foreign principal; that . . . his registration statement is available for inspection at, and copies of such political propaganda are filed with, the Department of Justice; and that registration of agents and foreign principals required by this subchapter *does not indicate approval by the United States government of the contents of their political propaganda.*" [22 U.S.C. 614(b) emphasis added, and regulations of the Department of Justice, Sec. 5.402(e), 28 C.F.R. 125]

10. In January of this year the Registration Unit determined that the three films were political propaganda and thus governed by the Act's reporting and labeling provisions, since the films were to be distributed by the National Film Board of Canada, an "agent" of the Canadian government as defined in the Act [22 U.S.C. 612]. The Board has been told to insert the required label and file the appropriate reports. [See Exhibit II (letter from

defendant Clarkson, to Board) ; Exhibit I (the suggested label) ; Exhibit III (the reporting form).]

11. Should he exhibit one or more of the films with the label and disclaimer required under Section 614(b) as quoted in paragraph 9, plaintiff would be falsely, maliciously, and unlawfully identified as the disseminator of distorted and untrue information on behalf of a foreign power. The exhibitor of a film labeled foreign political propaganda becomes, by definition, a disseminator of foreign political propaganda.

12. By reason of defendant's actions, plaintiff has suffered and will continue to suffer hardship and irreparable damage to the free exercise of his First Amendment liberties, in that he may not now and he will not be able in the future to exhibit without interference the films while they remain labeled as political propaganda in the manner required by the Act. In addition, plaintiff is denied the full, unrestricted, and effective use of all means at his disposal, including the three films, to effect the ongoing national debate about the appropriate level of military spending, and the statewide debate about the appropriate response to the appearance of acid rain in the South.

CAUSES OF ACTION

FOR A FIRST CAUSE OF ACTION

13. The defendant's enforcement of the Act with respect to the three Canadian films amounts to an unconstitutional denial of plaintiff's political and intellectual rights under the First Amendment, in that plaintiff has been and continues to be prevented from receiving and exhibiting one or more of the films because the consequences referred to in paragraph 11 would impact adversely upon his personal and professional reputations. Alternatively, defendants' enforcement of FARA would require plaintiff to act in conjunction with any such receipt and exhibition to somehow negate the adverse consequences of the stigma. Defendant's actions deny

plaintiff the opportunity to obtain for use, from whatever source and without governmental blessing or burden, the best information available on matters of public importance as a prelude to free and open debate.

FOR A SECOND CAUSE OF ACTION

14. The defendant's enforcement of the Act with respect to the three Canadian films amounts to an unconstitutional denial of plaintiff's political and intellectual rights under the First Amendment, in that defendants, through their actions, in effect have denied him and will continue to deny him the free and unfettered right to associate with others in a search for truth on matters of public importance without interference from government.

15. Plaintiff therefore has no adequate or speedy remedy at law and this action for declaration of rights and injunctive relief is plaintiff's only means for securing relief.

WHEREFORE, plaintiff prays that this Court:

(A) Issue a preliminary injunction ordering defendants, their agents and successors, to refrain immediately, pending the final hearing and determination of this action, from enforcing the Foreign Agents Registration Act with respect to the three films referred to in this complaint;

(B) Adjudge and declare Title 22 Sec. 614 of the United States Code unconstitutional on its face, and/or as construed and applied with respect to one or more of the films here at issue;

(C) Issue a permanent injunction restraining and preventing defendants, their agents and successors from enforcing, executing, administering or in any manner giving effect to said statute;

(D) Grant costs and attorney's fees; and

(E) Grant plaintiff such other and further relief as the Court may deem just and equitable.

DATED: 3/24/83

Respectfully submitted,

/s/ John G. Donhoff
 JOHN G. DONHOFF
 Attorney for plaintiff
 1710 G Street, #8
 Sacramento, Calif. 95814
 (916) 447-1370

**KEENE v. SMITH COMPLAINT
EXHIBIT I**

**REQUIRED BY SECTION 4B
(FOR FILMS)**

This material is prepared, edited, issued or circulated by (name and address of registrant) which is registered with the Department of Justice, Washington, D.C. under the Foreign Agents Registration Act as an agent of (name and address of foreign principal). Dissemination reports on this film are filed with the Department of Justice where the required registration statement is available for public inspection. Registration does not indicate approval of the contents of this material by the United States Government.

INSTRUCTIONS: Report must be submitted in duplicate to the Registration Unit, Internal Security Section, Criminal Division, Department of Justice, Washington, D.C. 20530. The original must be signed by or on behalf of the registrant. All items in this form must be answered, unless the answer is "none" or "not applicable," in which case such an entry shall be made in the appropriate space. If additional space is needed for any item, attach supplemental sheet identifying each item.

1. Name of registrant	2. Registration No.
-----------------------	---------------------

3. Nature of material (*A concise account of the nature of the propaganda material filed*)

4. Title of material, if any	5. Name of foreign principal on whose behalf this material was transmitted.
------------------------------	---

6. Means of transmission	7. Dates of transmission	8. Total copies transmitted
--------------------------	--------------------------	-----------------------------

9. List addresses from which this material was transmitted:	10. List states and territories of the United States to which material was transmitted:
---	---

11. Types of recipients (<i>Give number of organizations in each group</i>)	12. List names and addresses of persons or organizations receiving 100 copies or more:
---	--

Libraries _____
Public officials _____
Newspapers _____
Press services of _____
associations _____
Educational _____
institutions _____
Civic groups _____
Other (*specify*) _____

13. If the material transmitted was a film or radio or television script, furnish the following information:

Name of station, organization, or theater using
(*including city and state*)

Date or dates broadcast or shown

Estimated attendance
(for film(s))

14. Have two copies of this material been filed with the Department of Justice? Yes ☐ No ☐

15. Has this material been labeled as required by the act? Yes ☐ No ☐

Date of report

Name and title

Signature

Keene v. Smith Complaint
Exhibit II

**KEENE v. SMITH COMPLAINT
EXHIBIT I-I**

JEC:EML:kal

Typed: 12/14/82

149-1615

13 Jan. 1983

A. Kenneth Shere,
U.S. General Manager
National Film Board of Canada
16th Floor
1251 Avenue of the Americas
New York, New York 10020

Re: Registration No. 437

Dear Mr. Shere:

This is in reference to your organization's registration under the Foreign Agents Registration Act, and to the films recently submitted in response to our request of September 22.

Our review of the five films has disclosed that three of the titles constitute political propaganda within the meaning of section 1(j) of the Act, and are therefore subject to the provisions of section 4 of the Act as outlined on the enclosed sheet. The three films are: *If You Love this Planet*, *Acid from Heaven*, and *Acid Rain: Requiem or Recovery*.

All of the films have been returned to you under separate cover.

Thank you for your cooperation.

Sincerely,

JOSEPH F. CLARKSON, Chief
Registration Unit
Internal Security Section
Criminal Division

Enclosure

cc: Records
Chrono
EMLucas

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

Civil Action No. CIVS-83-287 RAR

BARRY KEENE
State Senator
2032 State Capitol Building
Sacramento, California 95814
(916) 445-3375, PLAINTIFF

v.

WILLIAM FRENCH SMITH
Attorney General of the United States
U.S. Department of Justice
9th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

and

JOSEPH E. CLARKSON
Chief, Registration Unit
Internal Security Section
U.S. Department of Justice
315 9th Street, N.W., Room 100
Washington, D.C. 20530, DEFENDANTS

[Filed Mar. 24, 1983]

**AFFIDAVIT IN SUPPORT OF
PRELIMINARY INJUNCTION**

I intend to request for exhibition the three films named in the complaint and petition for injunctive relief.

The film "If You Love This Planet" concerns the problems associated with the world overproduction of nuclear

weapons systems. In Washington, Congress is now considering the extent to which public funds in the 1983-84 budget should be devoted to purchasing more and deadlier systems. I am irreparably injured by the government every day the FARA reporting and labeling requirements prevent me from obtaining and using "If You Love This Planet" to inform myself and others so as to effect the debate over this year's military budget.

The films "Acid Rain: Requiem or Recovery" and "Acid From Heaven", concern crucial questions about the appropriate approach to take in preventing acid rain. Southern California reportedly has a serious acid rain problem. Right now, a bill in the California Legislature—SB 55 (Roberti)—would address the acid rain problem in this state. Everyday I am prevented from obtaining and exhibiting this film by the reporting and labeling requirements of FARA, I am irreparably injured, since I cannot use the films to inform myself and others and effect the decision on SB 55 or any other policy matter concerning acid rain.

I, Barry Keene, plaintiff in the above entitled action, being first duly sworn, state that this is a true and accurate recitation of facts upon which rests my petition for a preliminary injunction.

Sworn to this day,

/s/ Barry Keene
BARRY KEENE

3-24-83

(date)

under penalty of perjury.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil Action No. CIVS-83-287-RAR

BARRY KEENE,
State Senator
2032 State Capitol Building
Sacramento, California 95814
(916) 445-3375, PLAINTIFF

v.

WILLIAM FRENCH SMITH, ET AL., DEFENDANTS

DECLARATION

Joseph E. Clarkson, being duly sworn, deposes and says:

1. I am the Chief of the Registration Unit in the Internal Security Section of the Criminal Division of the Justice Department and a defendant in the above entitled action. I make this declaration on behalf of defendants in the above entitled action.

2. The defendants have requested, pursuant to the Foreign Agents Registration Act, 22 U.S.C. §§ 611, *et seq.* ("FARA"), that the National Film Board of Canada ("NFBC") attach a neutral statutory disclaimer to the films mentioned in the complaint in this action. Letter from Joseph F. Clarkson to A. Kenneth Shere, January 13, 1983; attached hereto as Exhibit A. The NFBC registered with the United States Government as an agent of the Government of Canada in 1947, and has repeatedly registered since that time. A copy of its most recent

supplemental registration statement is attached hereto as Exhibit B.

3. The NFBC has requested a reconsideration of the Justice Department's application of the FARA to the three films and that request is now the subject of discussions between defendants and NFBC. Pending resolution of the matter, none of said films contain the statutory disclaimer Senator Keene complains of. The terms of the disclaimer are set forth at Exhibit I to plaintiff's complaint. Nowhere in the disclaimer is the term "political propaganda" used. While the request is pending, the Film Board has not submitted dissemination reports about the films as provided by the Act.

4. The Justice Department has never construed the Act to apply to a person in Senator Keene's position, and thus has not, does not, and will not require Senator Keene to attach the neutral statutory disclaimer to, or exhibit the disclaimer on said films if he obtains them. The Registration Unit has taken and will take no action which prevents Senator Keene from receiving said films; no action which requires Senator Keene to comply with the labeling provision of the Act; and no action which denies Senator Keene the opportunity to obtain the films for use without the "stigmatizing" label. At no time has the Registration Unit sought to require Senator Keene to do, or refrain from doing, anything under the authority of the Foreign Agents Registration Act.

5. At no time has Senator Keene Sought the benefit of the Department's view of the application of the Act to his circumstances under 28 C.F.R. § 5.2, or any other provision.

6. The disclaimer, even if it were attached to said films, would and could not identify Senator Keene as a disseminator of the films. The disclaimer, even if it were attached to said films, would not indicate that the information in the films is distorted or untrue.

And further the affiant saith not. I swear under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

/s/ Joseph E. Clarkson
JOSEPH E. CLARKSON
Chief, Registration Unit
Internal Security Section
Criminal Division
Department of Justice
Washington, D.C. 20530
(202) 724-7109

EXHIBIT A

13 Jan. 1983

JEC:EML:kal
 Typed: 12/14/82
 149-1615

A. Kenneth Shere,
 U.S. General Manager
 National Film Board of Canada
 16th Floor
 1251 Avenue of the Americas
 New York, New York 10020

Re: Registration No. 437

Dear Mr. Shere:

This is in reference to your organization's registration under the Foreign Agents Registration Act, and to the films recently submitted in response to our request of September 22.

Our review of the five films has disclosed that three of the titles constitute political propaganda within the meaning of section 1(j) of the Act, and are therefore subject to the provisions of section 4 of the Act as outlined on the enclosed sheet. The three films are: *If You Love this Planet*, *Acid from Heaven*, and *Acid Rain: Requiem or Recovery*.

All of the films have been returned to you under separate cover.

Thank you for your cooperation.

Sincerely,

Joseph F. Clarkson, Chief
 Registration Unit
 Internal Security Section
 Criminal Division

Enclosure

cc: Records
 Chrono
 EMLucas

EXHIBIT B

For Six Month Period Ending 31 Dec. 1982

Name of Registrant

NATIONAL FILM BOARD OF CANADA
 Registration No. 437

Business Address of Registrant

1251 Avenue of the Americas, 16th Floor
 New York, New York 10020, U.S.A.

I—REGISTRANT

1. Has there been a change in the information previously furnished in connection with the following:

(a) If an individual:

(1) Residence address	Yes <input type="checkbox"/>	No <input type="checkbox"/>
(2) Citizenship	Yes <input type="checkbox"/>	No <input type="checkbox"/>
(3) Occupation	Yes <input type="checkbox"/>	No <input type="checkbox"/>

(b) If an organization:

(1) Name	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>
(2) Ownership or control	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>
(3) Branch offices	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>

2. Explain fully all changes, if any, indicated in item 1.

IF THE REGISTRANT IS AN INDIVIDUAL,
 OMIT RESPONSE TO ITEMS 3, 4, and 5.

3. Have any persons ceased acting as partners, officers, directors or similar officials of the registrant during this 6-month reporting period? Yes ☐ No ☒

If yes, furnish the following information:

Name	Position	Date Connection Ended
.	.	.

8. Has your connection with any foreign principal ended during this 6 month reporting period?

Yes ☐ No ☒

If yes, furnish the following information:

Name of foreign principal *Date of Termination*

9. Have you acquired any new foreign principal¹ during this 6 month reporting period? Yes ☐ No ☒

If yes, furnish following information:

Name and address of foreign principal *Date acquired*

10. In addition to those named in Items 8 and 9, if any, list the foreign principals¹ whom you continued to represent during the 6 month reporting period.

National Film Board of Canada, Ottawa, Ontario, Canada

III—ACTIVITIES

11. During this 6 month reporting period, have you engaged in any activities for or rendered any services to any foreign principal named in Items 8, 9, and 10 of this statement? Yes ☒ No ☐

If yes, identify each such foreign principal and describe in full detail your activities and services:

National Film Board of Canada, Ottawa, Ontario, Canada.

¹ The term "foreign principal" includes, in addition to those defined in section 1(b) of the Act, an individual or organization any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign government, foreign political party, foreign organization or foreign individual. (See Rule 100(a)(9)).

A registrant who represents more than one foreign principal is required to list in the statement he files under the Act only those foreign principals for whom he is not entitled to claim exemption under Section 3 of the Act. (See Rule 208.)

Promotion and distribution through commercial and non-commercial channels of Canadian Government information, documentary and cultural films, filmstrips, and other visual aid materials to public film libraries, educational institutions, government agencies, etc. Activities also include dissemination of catalogues, folders and information sheets describing the films distributed; participation at conferences, seminars and other functions pertaining to the use of audio visual materials.

The National Film Board of Canada maintains three offices in the U.S. to serve these activities: New York, Chicago and Los Angeles.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. S-83-287-R

BARRY KEENE
State Senator
2032 State Capitol Building
Sacramento, CA 95814
(916) 445-3375, PLAINTIFF

v.

WILLIAM FRENCH SMITH
Attorney General of the United States
U.S. Department of Justice
9th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

and

JOSEPH E. CLARKSON
Chief, Registration Unit
Internal Security Section
U.S. Department of Justice
315 9th Street, N.W.
Room 100
Washington, D.C. 20530, DEFENDANTS

Time: May 23, 1983
Hearing: 9:00 a.m.
Judge: Paul A. Ramirez

DECLARATION OF HARRY BISTRIN
IN SUPPORT OF PLAINTIFF'S MOTION
FOR A PRELIMINARY INJUNCTION

I, HARRY BISTRIN, declare as follows:

I

That I am a long-time resident, businessman, and Democratic Party leader from Eureka, Humboldt County, California. I am one of the owners of Bistrin's, a business with retail outlets located throughout the North Coast of California, including the counties of Humboldt, Mendocino, Sonoma and Solano.

II

That for approximately the last ten years I have served as the Treasurer of Senator Keene's campaign committees. In addition, I have served as a principal political fundraiser and advisor to Senator Keene for over a decade. Due to my active political involvement and knowledge of the District I am intimately familiar with its "political climate" and am competent to testify as to the adverse political impacts of the government's action upon the plaintiff if called upon to be a witness.

III

That the Second Senate District is comprised of much of the counties of Del Norte, Humboldt, Mendocino, Sonoma and Solano. The population of the North Coast is particularly comprised of inhabitants who are active in community affairs. It is very much a conservative District with an extremely depressed economy, dependant solely upon the wood products, fishing and tourism industries. In Del Norte County, unemployment has recently run as high as 30%. Due to the high level of unemployment along the North Coast, many residents have developed a clear and well-defined resentment to foreign

competition. At this time one of the most heated of issues is whether raw wood products should be shipped overseas for further processing, or whether such material should be processed domestically. Similar crucial issues center upon the rights of foreign governments to other North Coast resources; such as foreign fishing rights. Because of issues such as these, and the fear of future losses to employment due to foreign competition, North Coast voters have developed a noticable animosity towards competing foreign interests and those who are perceived as advocating "un-American" interests.

IV

That in past elections, Senator Keene has been attacked by his opponents and/or the press for such otherwise mundane matters as the wearing of a beard and the driving of a foreign car. And I have no doubt but that some members of the North Coast press, present political adversaries, and future opponents, would openly seize upon the opportunity to utilize the government's reporting, dissemination and label requirements under FARA to their benefit by portraying the plaintiff as a disseminator of "foreign political propaganda." For these reasons the plaintiff has a compelling interest, perhaps more than most citizens, to ensure that the exercise of his first amendment rights does not "boomerang" to be utilized as a deadly weapon against him in his political career.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on May —, 1983, in Eureka, California.

/s/ Harry Bistrin
HARRY BISTRIN

DECLARATION OF ED CANAPARY

FAIRBANK, CANAPARY & MAULIN

Public Opinion Research

447 Sutter Street Penthouse

San Francisco, California 94108

May 19, 1983

Mr. John Donhoff, Esq.
2187 State Capitol Building
Sacramento, CA 95814

Dear Mr. Donhoff:

This letter expresses my opinion with respect to the question you posed to me by telephone this morning.

DONHOFF'S QUESTION,

"If a local Legislator was associated with 'foreign political propaganda', would Fairbank, Canapary & Maullin be able to measure the effect—whatever it might be—through its normal data-gathering and poll-taking procedures?"

CANAPARY'S ANSWER,

"Yes. In my opinion, a research survey could be developed to measure (within normal statistical tolerances) voter perception with respect to the effect this would have on their voting behavior."

Under penalty of perjury, I declare the above to be my honest opinion on this matter.

Please see Exhibit "A", attached, which describes the background and professional credentials of Ed Canapary, and Fairbank, Canapary & Maullin.

Yours truly,

/s/ Ed Canapary
ED CANAPARY
Partner

EC:vc
Attachment

SF #2218

FAIRBANK, CANAPARY & MAULLIN is a full-service public affairs, political, and market research firm with offices in San Francisco and Los Angeles. Its experience has been attained through hundreds of projects involving political surveys, education, transportation, and cable television studies, legal, social, and environmental research. In 1982, Fairbank, Canapary & Maullin made significant contributions to 43 Legislative, Congressional, and Statewide campaigns through opinion polling and analysis of raw data.

Our clients have included Superintendent of Public Instruction Bill Honig, Attorney General John Van de Kamp, Secretary of State March Fong Eu, Lt. Governor Leo McCarthy, and U.S. Senator Alan Cranston.

Since 1981, Fairbank, Canapary & Maullin has conducted four Voter Attitude Studies for State Senator Barry Keene (March, 1981; March, August, and October, 1982). Other research performed in the same general geographic area include studies for U.S. Congressman Doug Bosco; U.S. Congresswoman Barbara Boxer; U.S. Congressman Vic Fazio; and State Assemblyman Tom Hannigan. This has enabled Fairbank, Canapary & Maullin to become experienced with voter response/make-up in the region.

ED CANAPARY has been involved in marketing and opinion research for over 25 years. He has conducted market and opinion research for clients throughout the nation in a wide variety of fields ranging from banks, public utilities, government, and consumer product companies. He is a past-President of the Northern California chapter of the American Marketing Association.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. S-83-287-R

BARRY KEENE
State Senator
2032 State Capitol Building
Sacramento, CA 95814
(916) 445-3375, PLAINTIFF

v.

WILLIAM FRENCH SMITH
Attorney General of the United States
U.S. Department of Justice
9th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

and

JOSEPH E. CLARKSON
Chief, Registration Unit
Internal Security Section
U.S. Department of Justice
315 9th Street, N.W.
Room 100
Washington, D.C. 20530, DEFENDANTS

Time: 9:00 a.m.

Hearing: May 23, 1983

Judge: Paul A. Ramirez

DECLARATION OF DAVID I. FREED
IN SUPPORT OF PLAINTIFF'S MOTION
FOR A PRELIMINARY INJUNCTION

I, DAVID I. FREED declare:

1. That I am an attorney at law duly admitted to the bar of the State of California. I am one of the three principal partners in the law firm of Tobin & Tobin located at 2600 Crocker Plaza, One Post Street, in the City and County of San Francisco.

2. That in my capacity as a managing partner of Tobin & Tobin, I am responsible for ensuring that the attorneys who are employed by this office are in fact, and who appear to be, of impeccable legal character and reputation.

3. That the plaintiff first became associated with Tobin & Tobin on July 1, 1979. Since that time he has been engaged in the active practice of law and receives compensation from this firm.

4. Tobin & Tobin is the oldest law firm in the western states, having first been organized in San Francisco in 1852. During the past century, the firm has built an outstanding reputation, and because of this reputation, has prospered in San Francisco, despite the fact that the area is the most competitive in the world for the practice of law.

5. In its 131-year existence, Tobin & Tobin has developed a broad base of clients which include banks, title companies, religious organizations, and a myriad of other business entities. A representative list is as follows:

American National Bank, Chicago; Bank of the West; Bank of Trade of San Francisco; California First Bank; Redwood Bank; Chicago Title Insurance Co.; Commonwealth Land Title Insurance Co.; First American Title Insurance Co.; Founders Title Co.; Safeco Title Insurance Co.; Transamerica Title Insurance Co.; Title Insurance Company of Minnesota;

Catholic Foreign Mission Society of America (Maryknoll); Conference of Religious Treasurers, Region XIV; Sisters of the Holy Family; Sisters of the Presentation; Automotive Engineering Co.; Bishop Corp.; Boudin International, Inc.; Colombo Bakeries, Inc.; Coopers & Lybrand; D. K. Marketing; Exchange Linen Service; Grace Honda; Great American Insurance Co.; Hexalon Real Estate, Inc.; Mayntz Corp.; Morguard Trust Co.; The Musto Cos.; Murco Development, Inc.; Pacific Agri Products; Parisian Bakeries, Inc.; Royal Cathay Trading Co.; Stanislaus Imports, Inc.; Tamaras Supply, Inc.; Textile Services Industries, Inc.; United Bakers Association; University Capital Corp.; Universal Supply, Inc.; and the Hibernia Bank.

6. The legal work that this office provides to such clients involves state and federal trial work, labor negotiations, general business practice, tax matters, and advocacy before administrative tribunals and regulatory agencies.

7. That it is my opinion that the primary reasons for which clients utilize the services of Tobin & Tobin is because of their excellent legal skills and the appearance of individuals who maintain an impeccable reputation and appearance before the general public. Further, because nearly all of our clients are domestic entities, they expect representation that is untainted from influence by foreign companies or governments.

8. The labeling requirements of FARA have so stigmatized the films that the plaintiff cannot be viewed as anyone other than a dissemination of foreign political propaganda. As Senator Keene is a popular public official, there is no doubt but that his exhibition of these films which have been designated as propaganda by the defendants would result in adverse press attention to be circulated to the clients of this firm.

9. The registration requirements of FARA require detailed reports of information about those who "asso-

ciate" with disseminators of "foreign propaganda." Because there exists an imminent probability that Senator Keene's name will appear on records as being associated with a "foreign propagandist," as a prominent member of this firm, he will be viewed by our clients as intimately associated with foreign lobbyists, "propagandists" and others who seek to disseminate "un-American" views.

10. I view these consequences as diminishing the credibility and reputation of the firm in general; as casting upon the firm (as well as the plaintiff) an aura of diminished patriotism; and as impeding each the firm's ability to accomplish the goals and benefits for our clients that might be otherwise obtained without a government mandated "unsavory association." In particular, many of our clients would have severe misgivings if a member of this firm were "associated" with the representation of the foreign principals.

11. That I will not sacrifice the reputation of this firm or its clients. So long as the federal government requires that the subject films be registered and labeled as foreign propaganda, I will impose the requirement, as a condition of future employment, that the plaintiff forebear from exhibiting the subject films.

I declare under penalty of perjury that the foregoing is true [sic] and correct and that this declaration was executed on May 19, 1983, at San Francisco, California.

TOBIN & TOBIN

/s/ David I. Freed
DAVID I. FREED

DECLARATION OF DONALD PETERSON

CALIFORNIA STATE SENATE

Barry Keene

Senator, 2nd District

Del Norte, Humboldt, Mendocino,

Solano and Sonoma Counties

Chairman, Senate Judiciary Committee

I, Donald Peterson declare:

1. During the past 20 years, Political Science has been both my vocation and avocation. I have a Bachelor of Arts in Political Science from Humboldt State University and a Master of Arts in Political Science from the University of California, Berkeley.
2. During a ten-year period from 1965 to 1975, I taught seven quarters as a full-time member of the political science staff and four quarters as a part-time instructor at Humboldt State University. Courses taught included Public Administration, Budget Process, State and Local Government, Urban Politics, Political Parties, California Government, Public Opinion and the American Presidency.
3. During the three-year period from 1977 to 1980 I taught Public Administration, Public Policy, State and Local Government and Personnel Administration for the University of California, Santa Barbara.
4. During the two-year period from 1978 to 1980 I taught Public Administration, State and Local Government and Graduate seminar in Public Administration for Golden Gate University.
5. From 1979 and 1983 I was on the staff of the College of the Redwoods in Eureka, California, first as the Director of Public Service Education, and then as Vice President for Academic Services.

6. In addition to my professional political science experience, I have also been very active in politics both as a candidate and as a campaign worker. I served as an elected official, running for and winning election to the Humboldt County Board of Supervisors twice. I was the Republican candidate for the State Assembly in 1974 from the first Assembly District. I have managed or have been the finance director for four campaigns for the State Assembly, two for Congress, and one for the State Senate.

7. I have been the county campaign manager of Republican candidates for Governor on four occasions, Lieutenant Governor twice, and State Controller twice.

8. It is also important to note that I have considerable familiarity with the Second Senate District both as an active participant in political campaigns and as a member of public bodies. I served as the chairman of the North Coast Criminal Justice Planning Board for eleven years. That Board's jurisdiction included Humboldt, Del Norte, Lake, and Mendocino Counties.

9. I also served on the North Coast Regional Coastal Commission which was composed of Humboldt, Del Norte, and Mendocino Counties, and I represented those counties on the State Coastal Commission for two years.

10. In addition to these positions I have served on two other North Coast regional boards, one being NorCoa Health, which was the comprehensive health planning agency for the North Coast counties from 1969 to 1976. And I served on the developmental disabilities board for those same four north coast counties from 1969 to 1978.

11. I am currently the consultant for the Senate Subcommittee on the Administration of Justice.

12. Based on this experience, it is my opinion that Senator Keene's re-election chance could be harmed substantially should a political opponent be able to associate the Senator with "foreign political propaganda."

13. One potential tactic could take the form of a mailer in the last days of the campaign—allowing little or no opportunity for response—reprinting any U.S. Government document or news story that showed particular films to be classified as “propaganda”. Such a mailer, coupled with a charge that the Senator actually exhibited the same films, would have a significant impact on the vote, particularly in Solano County, the home of large and important Naval and Air Force bases.

14. It would not be the content of the film, but rather their designation by the Federal authorities as “foreign propaganda” that would create an unfavorable impression in the minds of many voters.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on May 20, 1983 at Sacramento, California.

/s/ Donald T. Peterson

DATE May 20, 1983

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

Civil Action No. S-83-287-RAR

BARRY KEENE, PLAINTIFF

v.

WILLIAM FRENCH SMITH, ET AL., DEFENDANTS

ANSWER

Defendants, by their undersigned counsel, hereby answer the complaint in the above-captioned case as follows:

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Plaintiff lacks standing to maintain this suit.

THIRD DEFENSE

The complaint fails to present a justiciable case or controversy.

FOURTH DEFENSE

In answer to the numbered paragraphs of the complaint, defendants hereby admit, deny and aver as follows:

1. This paragraph of the complaint contains plaintiff's characterizations of this action and not averments of fact to which an answer is required. However, insofar

as an answer may be deemed required, defendants admit the allegations contained in this paragraph.

2. This paragraph contains plaintiff's jurisdictional averments and not allegations of fact to which an answer is required. However, insofar as an answer may be deemed required, defendants deny the allegations of this paragraph.

3. Defendants are without knowledge and information sufficient to form a belief as to the truth of the allegations contained in this paragraph.

4. Defendants admit the allegations contained in this paragraph.

5. Defendants admit the allegations contained in this paragraph, except to deny that defendant Clarkson is an Assistant Attorney General.

6. Defendants deny the allegations contained in this paragraph and refer the Court to the full text of the Foreign Agents Registration Act ("the FARA"), 22 U.S.C. §§ 611, *et seq.*, for a complete statement of its contents and provisions.

7. Defendants deny the allegations contained in sentence one of this paragraph. Defendants deny the allegations contained in sentences two and three of this paragraph and refer the Court to the full text of the FARA for a complete statement of its contents and provisions.

8. Defendants deny the allegations contained in this paragraph and refer the Court to the full text of the FARA for a complete statement of its contents and provisions.

9. Defendants deny the allegations contained in this paragraph and refer the Court to the full text of the FARA and the regulations at 28 C.F.R. Part 5 for a complete statement of their respective contents and provisions.

10. Defendants deny the allegations contained in this paragraph and refer the Court to the full text of Exhibits I (FARA statement identifying foreign source of materials), II (FARA reporting form), and III (letter from Joseph F. Clarkson to A. Kenneth Shere, dated January 13, 1983) to the complaint for a complete statement of their respective contents.

11. Defendants deny the allegations contained in this paragraph.

12. Defendants deny the allegations contained in this paragraph.

13. Defendants deny the allegations contained in this paragraph.

14. Defendants deny the allegations contained in this paragraph.

15. Defendants deny the allegations contained in this paragraph.

Defendants deny that plaintiff is entitled to any relief from this Court.

Defendants hereby specifically deny all of the allegations of the complaint not hereinbefore otherwise answered.

WHEREFORE, defendants respectfully request that this action be dismissed.

Respectfully submitted,

J. PAUL MCGRATH
Assistant Attorney General

DONALD B. AYER
United States Attorney

/s/ David J. Anderson/SB
DAVID J. ANDERSON

/s/ Surell Brady
SURELL BRADY

/s/ Harriet Kerwin/SB
HARRIET KERWIN

Attorneys, Department of Justice
Civil Division, Room 3535
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-5302
Attorneys for Defendants.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. S-83-287-RAR

BARRY KEENE
State Senator
2032 State Capitol Building
Sacramento, California 95814
(916) 445-3375, PLAINTIFF

v.

WILLIAM FRENCH SMITH
Attorney General of the United States
U.S. Department of Justice
9th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

and

JOSEPH E. CLARKSON
Chief, Registration Unit
Internal Security Section
U.S. Department of Justice
315 9th Street, N.W., Room 100
Washington, D.C. 20530, DEFENDANTS

**AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF**

I. INTRODUCTORY STATEMENT

1. This is a civil action seeking declaratory and injunctive relief against the application by defendants

of the labelling and reporting requirements of the Foreign Agents Registration Act (22 U.S.C. §§ 611-621, hereinafter "FARA" or "the Act") and the regulations promulgated pursuant thereto (28 C.F.R. Part 5) to the distribution and exhibition of three films produced by the National film Board of Canada: *If You Love This Planet*, about the environmental effects of nuclear war; *Acid From Heaven* and *Acid Rain: Requiem or Recovery*, both concerned with contamination of rain water by airborne pollutants (hereinafter "the films"). Plaintiff seeks declaratory and injunctive relief prohibiting defendants from stigmatizing the films as "political propaganda" under section 4 of FARA, from requiring plaintiff to exhibit denigrating labels along with the films, and thereby from improperly associating plaintiff, and his opinions on issues of public importance, with the aims and practices of foreign political propagandists. Plaintiff also seeks a declaration that the provisions of the Act regulating "political propaganda" are unconstitutional on their face.

JURISDICTION

2. This action arises under the First Amendment to the Constitution of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. 1331.

THE PARTIES

3. Plaintiff is a California State Senator, representing the Second Senatorial District, Chairman of the Senate Judiciary Committee, and a member of the California State Bar.

The devastating environmental effects of nuclear war and acid rain are crucial matters of public concern to the people of California and of the United States.

Plaintiff wishes to exhibit one, two or all three of the films. He desires to exhibit them in the California State Capitol for viewing by his staff, other legislative and

state employees, and members of the Legislature. He wishes also to exhibit one or more of them to the general public either at the state Capitol or in other locations. Plaintiff intends thereby to both gather information on these important topics and to stimulate free and open discussion and debate about these problems and their potential solutions. Plaintiff intends to exhibit the films on a nonprofit, noncommercial basis.

4. Defendant William French Smith is Attorney General of the United States, responsible for the administration of the Department of Justice and for enforcement of the laws of the United States.

5. Defendant Joseph E. Clarkson is an Assistant Attorney General in charge of the Registration Unit of the Internal Security Section of the Department of Justice. The Registration Unit administers FARA.

BACKGROUND INFORMATION AND EVENTS AT ISSUE

6. FARA requires agents of foreign governments to register as such with the Department, and, among other things, requires that two copies of political propaganda transmitted or caused to be transmitted in interstate commerce by such agents be filed with the Registration Unit within 48 hours of its transmittal, along with a statement "setting forth full information as to the places, times and extent of such transmittal." [22 U.S.C. 614 (a)]

7. Films to be distributed by agents of a foreign government are reviewed by the Registration Unit. Under the Act, the Unit may then classify such films "political propaganda." The transmittal and exhibition of political propaganda presented through the means of a motion picture must be fully reported, on a monthly basis, setting forth the time, place and extent of the exhibition or exhibitions.

8. Political propaganda is defined in the Act, among other things, to mean: "any oral, visual, graphic, written, pictorial or other communication or expression by

any person (1) which is reasonably adapted to or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States. . . . [22 U.S.C. 611(j); emphasis added]

9. Political propaganda presented through means of a motion picture must include at the beginning of the film a statement "setting forth the relation or connection between the person transmitting the political propaganda or causing it to be transmitted and such propaganda; that the person transmitting such political propaganda or causing it to be transmitted is registered under this subchapter with the Department of Justice . . . as an agent of a foreign principal, together with the name and address of such agent of a foreign principal and of such foreign principal; that . . . his registration statement is available for inspection at, and copies of such political propaganda are filed with, the Department of Justice; and that registration of agents and foreign principals required by this subchapter *does not indicate approval by the United States government of the contents of their political propaganda.*" [22 U.S.C. 614(b) emphasis added, and regulations of the Department of Justice, Sec. 5.402(e), 28 C.F.R. 125]

10. In January of this year the Registration Unit determined that the three films were political propaganda and thus governed by the Act's reporting and labeling provisions, since the films were to be distributed by the National Film Board of Canada, an "agent" of the Canadian government as defined in the Act [22 U.S.C. 612]. The Board has been told to insert the required label and file the appropriate reports. [See Exhibit II (letter from defendant Clarkson, to Board); Exhibit I (the suggested label); Exhibit III (the reporting form).]

11. Should he exhibit one or more of the films after they have been classified as political propaganda as described and alleged in paragraphs 7 and 10, plaintiff would be falsely, maliciously, and unlawfully identified as the disseminator of distorted or untrue information on behalf of a foreign power. The exhibitor of a film classified foreign political propaganda becomes, by logical extension a disseminator of foreign political propaganda.

12. Should he exhibit one or more of the films with the label and disclaimer required under Section 614(b) as quoted in paragraph 9 and/or should the fact of the exhibition be made a part of the public record as the result of FARA, plaintiff would be falsely, maliciously, and unlawfully identified as the disseminator of distorted or untrue information on behalf of a foreign power. The exhibitor of a film classified foreign political propaganda becomes, by logical extension, a disseminator of foreign political propaganda.

13. By reason of defendant's actions, plaintiff has suffered and will continue to suffer hardship and irreparable damage to the free exercise of his First Amendment liberties, in that he may not now and he will not be able in the future to exhibit without interference the films while they remain classified or labeled as political propaganda in the manner required by the Act. In addition, plaintiff is denied the full, unrestricted, and effective use of all means at his disposal, including the three films, to effect the ongoing national debate about the appropriate level of military spending, and the statewide debate about the appropriate response to the appearance of acid rain in the South.

CAUSES OF ACTION FOR A FIRST CAUSE OF ACTION

14. The defendant's enforcement of the Act with respect to the three Canadian films amounts to an unconstitutional denial of plaintiff's political and intellectual

rights under the First Amendment, in that plaintiff has been and continues to be prevented from receiving and exhibiting one or more of the films because the consequences referred to in paragraphs 11 and 12 would impact adversely upon his personal and professional reputations. Alternatively, defendants' enforcement of FARA would require plaintiff to act in conjunction with any such receipt and exhibition to somehow negate the adverse consequences of the stigma, a burden that defendants are prohibited by the First Amendment from imposing. Defendant's actions deny plaintiff the opportunity to obtain for use, from whatever source and without governmental blessing or burden, the best information available on matters of public importance as a prelude to free and open debate.

FOR A SECOND CAUSE OF ACTION

15. The defendant's enforcement of the Act with respect to the three Canadian films amounts to an unconstitutional denial of plaintiff's political and intellectual rights under the First Amendment, in that defendants, through their actions, in effect have denied him and will continue to deny him the free and unfettered right to associate with others in a search for truth on matters of public importance without interference from government.

16. Plaintiff therefore has no adequate or speedy remedy at law and this action for declaration of rights and injunctive relief is plaintiff's only means for securing relief.

WHEREFORE, plaintiff prays that this Court:

(A) Issue a preliminary injunction ordering defendants, their agents and successors, to refrain immediately, pending the final hearing and determination of this action, from enforcing the Foreign Agents Registration Act with respect to the three films referred to in this complaint;

(B) Adjudge and declare Title 22 Sec. 614 of the United States Code unconstitutional on its face, and/or as construed and applied with respect to one or more of the films here at issue;

(C) Issue a permanent injunction restraining and preventing defendants, their agents and successors from enforcing, executing, administering or in any manner giving effect to said statute;

(D) Grant costs and attorney's fees; and

(E) Grant plaintiff such other and further relief as the Court may deem just and equitable.

DATED _____ Respectfully submitted,

JOHN G. DONHOFF
Attorney for plaintiff
1500 7th Street, 6I
Sacramento, California 95814
(916) 447-1370

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil Action No. S-83-287-RAR

BARRY KEENE, PLAINTIFF

v.

WILLIAM FRENCH SMITH, ET AL., DEFENDANTS

[Filed Jan. 11, 1984]

ANSWER TO AMENDED COMPLAINT

Defendants, by their undersigned counsel, hereby answer the amended complaint in the above-captioned case as follows:

FIRST DEFENSE

The amended complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Plaintiff lacks standing to maintain this suit.

THIRD DEFENSE

The amended complaint fails to present a justiciable case or controversy.

FOURTH DEFENSE

In answer to the numbered paragraphs of the amended complaint, defendants hereby admit, deny and aver as follows:

1. This paragraph of the complaint contains plaintiff's characterization of this action and not averments of fact to which an answer is required. However, insofar as an answer may be deemed required, defendants admit the allegations contained in this paragraph.

2. This paragraph contains plaintiff's jurisdictional averments and not allegations of fact to which an answer is required. However, insofar as an answer may be deemed required, defendants deny the allegations of this paragraph.

3. Defendants are without knowledge and information sufficient to form a belief as to the truth of the allegations contained in this paragraph.

4. Defendants admit the allegations contained in this paragraph.

5. Defendants admit the allegations contained in this paragraph, except to deny that defendant Clarkson is an Assistant Attorney General.

6. Defendants deny the allegations contained in this paragraph and refer the Court to the full text of the Foreign Agents Registration Act ("the FARA"), 22 U.S.C. §§ 611, *et seq.*, for a complete statement of its contents and provisions.

7. Defendants deny the allegations contained in sentence one of this paragraph. Defendants deny the allegations contained in sentences two and three of this paragraph and refer the Court to the full text of the FARA for a complete statement of its contents and provisions.

8. Defendants deny the allegations contained in this paragraph and refer the Court to the full text of the FARA for a complete statement of its contents and provisions.

9. Defendants deny the allegations contained in this paragraph and refer the Court to the full text of the FARA and the regulations at 28 C.F.R. Part 5 for a complete statement of their respective contents and provisions.

10. Defendants deny the allegations contained in this paragraph and refer the Court to the full text of Exhibits I (FARA statement identifying foreign source of materials), II (FARA reporting form), and III (letter from Joseph F. Clarkson to A Kenneth Shere, dated January 13, 1983) to the complaint for a complete statement of their respective contents.

11. Defendants deny the allegations contained in this paragraph.

12. Defendants deny the allegations contained in this paragraph.

13. Defendants deny the allegations contained in this paragraph.

14. Defendants deny the allegations contained in this paragraph.

15. Defendants deny the allegations contained in this paragraph.

16. Defendants deny the allegations contained in this paragraph.

Defendants deny that plaintiff is entitled to any relief from this Court.

Defendants hereby specifically deny all of the allegations of the amended complaint not hereinbefore otherwise answered.

WHEREFORE, defendants respectfully request that this action be dismissed.

Respectfully submitted,

RICHARD K. WILLARD
Acting Assistant Attorney General

DONALD B. AYER
United States Attorney

/s/ David J. Anderson
DAVID J. ANDERSON

/s/ Surell Brady
SURELL BRADY

/s/ Mona S. Butler
MONA S. BUTLER

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Room 3535—Civil Division
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10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 633-5302

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil Action No. S-83-287-RAR

BARRY KEENE, PLAINTIFF

v.

WILLIAM FRENCH SMITH, ET AL., DEFENDANTS

SECOND DECLARATION OF JOSEPH E. CLARKSON

Joseph E. Clarkson, being duly sworn, deposes and says:

1. The Registration Unit, Internal Security Section, Criminal Division, United States Department of Justice, is responsible, among other things, for the administration and enforcement of the Foreign Agents Registration Act of 1938 ("FARA" or "the Act"), as amended, 22 U.S.C. §§ 611, *et seq.* The Registration Unit investigates and supervises the investigation of suspected civil or criminal violations of the Act and prosecutes appropriate cases in the United States district and appellate courts. As an incident of this responsibility, the Registration Unit also settles violations of the Act administratively short of litigation and provides actual or potential registrants with advice concerning the application of the Act to particular transactions, pursuant to 28 C.F.R. § 5.2.

2. In 1982, 725 active registrants were registered with the Attorney General pursuant to the Act. Since a registrant can be an individual, partnership, corporation, or other group of individuals, this substantially understates the number of people engaged in the political or quasi-

political activities covered by the Act. In 1982, for example, approximately 7,230 individuals were registered.* The registrants are classified by type as lawyer-lobbyists, advertising firms, public relations firms, political consultants, fund raisers, or foreign government offices promoting tourism and investment in the home country.

3. Many of the registrants utilize the film medium in their work. Some of the films utilized constitute "political propaganda" as that term is defined in the Act. In many, if not most cases, the registrants themselves determine that the FARA's disclosure and labeling requirements apply to their dissemination of specific films. In other cases, the registrants request advice from the Registration Unit pursuant to 28 C.F.R. § 5.2 as to whether the Act applies.

4. The National Film Board of Canada ("the Film Board") first registered under the Act in 1947, and has submitted supplemental registration statements continuously since then. Its most recent supplemental registration statement was filed in 1983.

5. In the instant case, the Film Board submitted titles of films for review by the Registration Unit. The Registration Unit requested the Film Board to provide five of the films for further review. Of these films, the three films at issue here, *If You Love This Planet*, *Acid From Heaven*, and *Acid Rain: Requiem or Recovery*, were determined to be subject to the FARA's labeling requirements for dissemination by the agent.

6. The label which has been approved for films subject to the Act is attached as Exhibit A. The label does not use the term "political propaganda".

* During calendar year 1982, the Department received 113 new registration statements and terminated 89 registrations, leaving a total of 725 active registrations on file as of December 31, 1982. Individuals acting as officials or employees or rendering assistance to a registrant for or in the interest of the latter's foreign principal filed 749 short-form registration statements under the Act, bringing the present total of active short-form registration statements to 7,230.

7. Attached as Exhibit B is a list of a sample of the films reported by agents pursuant to Section 4 of the FARA for recent years. The Registration Unit does not maintain a separate record of the films subject to the Act. Consequently, a complete listing of all films would require a burdensome agent-by-agent search of numerous files. Exhibit B was compiled by reviewing the files of foreign agents that members of the Registration Unit recalled as submitting films pursuant to the Act in recent years.

I swear under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Date: April 13, 1984

/s/ Joseph E. Clarkson
 JOSEPH E. CLARKSON
 Chief, Registration Unit
 Internal Security Eection
 Criminal Division
 Department of Justice
 Washington, D.C. 20530
 Telephone: (202) 724-7109

REQUIRED BY SECTION 4B (FOR FILMS)

This material is prepared, edited, issued or circulated by (name and address of registrant) which is registered with the Department of Justice, Washington, D.C. under the Foreign Agents Registration Act as an agent of (name and address of foreign principal). Dissemination reports on this film are filed with the Department of Justice where the required registration statement is available for public inspection. Registration does not indicate approval of the contents of this material by the United States Government.

List of films that have been determined to fall within the labeling requirements of the Act and/or for which dissemination reports have been filed during the years indicated.

Film	Foreign Principal	Foreign Agent	1977	1978	1979	1980	1981	1982	1983
<i>Berlin Means Business and More</i>	Berlin Economic Development Corporation	Modern Talking Picture Service					x	x	
<i>Crisis In the Rain</i>	Ontario Ministry of the Environment	Modern Talking Picture Service					x	x	x
<i>President Chiang Kai-Shek</i>	Coordination Council for North American Affairs	Public Service Audience Planners						x	
<i>The Wall of Terror</i>	German Consulate General	Association Films	x						
<i>Berlin-Destiny of A City</i>	"	"	x						
<i>A City of Crisis</i>	"	"	x						
<i>Israel in Germany</i>	"	"	x						
<i>Hong Kong Style</i>	Government of Hong Kong	Hong Kong Tourist Association	x		x	x	x		
<i>Made In Hong Kong</i>	"	"	x			x			
<i>A Race Against People</i>	"	"	x		x		x		
<i>A Million Lights Shall Glow</i>	"	"	x		x	x	x		
<i>Home At Last</i>	Consulate General of Israel	Jerome Shapiro d/b/a Alden Film, et al.	x	x	x	x	x	x	
<i>Israel Air Force</i>	"	"	x	x	x	x	x	x	

Film	Foreign Principal	Foreign Agent	1977	1978	1979	1980	1981	1982	1983
<i>May Peace Begin With Me</i>	Consulate General of Israel	Jerome Shapiro d/b/a Alden Films, et al.	x	x	x	x	x	x	
<i>Beyond The Mirage</i>	"	"	x	x	x	x	x	x	
<i>Go Through the Gates</i>	"	"	x	x	x	x	x	x	
<i>War on Yom Kippur</i>	"	"	x	x	x	x	x	x	
<i>Plight of Soviet Jewry: Let My People Go</i>	"	"	x	x	x	x	x	x	
<i>A Conversation With Golda Meir</i>	"	Modern Talking Picture Service							x
<i>Korea In Review</i>	Korean Consulate	Association Films	x	x	x	x	x	x	
<i>The Flag of Freedom</i>	"	"	x	x	x	x	x	x	
<i>Ties Across the Pacific</i>	"	"	x	x	x	x	x	x	
<i>Axe Murders at Panmunjom</i>	"	"	x						
<i>Aggression and Resistance</i>	Lebanese Forces	Lebanese Information and Research Center						x	
<i>Edge of Understanding</i>	Rhodesian Information Service	Association Films	x	x					
<i>What A Time</i>	Government of Rhodesia	Rhodesian Information Office		x	x				
<i>Face of Rhodesia</i>	"	"		x	x				
<i>Viscount Survivor</i>	"	"		x	x				

Film	Foreign Principal	Foreign Agent	1977	1978	1979	1980	1981	1982	1983
<i>Doppies</i>	Government of Rhodesia	Rhodesian Information Office			x				
<i>Chimoio Report</i>	"	"			x				
<i>Rhodesia Unafraid</i>	Government of Zimbabwe Rhodesia	Zimbabwe Rhodesian Information Office			x				
<i>Election 1979</i>	"	"			x				
<i>R.B.C. - T.V. Survey</i>	"	"			x				
<i>This Is Rhodesia</i>	"	"			x				
<i>Gaza Report</i>	"	"				x			
<i>Tsanga</i>	"	"				x			
<i>African Powerhouse</i>	Information Service of South Africa	Association Films	x	x	x	x	x		
<i>Land of Promise</i>	"	"		x	x	x	x		
<i>Vision of Gold</i>	"	"		x	x	x	x		
<i>Bantu Toddlers</i>	"	"		x					
<i>Mosaic of Progress - South Africa Today</i>	South Africa Department of Information	Image Industries, Inc.	x	x					
<i>Strategic Minerals</i>	South African Consulate	Modern Talking Picture Service						x	
<i>Ballad of a Soldier</i>	Sovexportfilm	Artkino Pictures, Inc.	x						

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Film	Foreign Principal	Foreign Agent	1977	1978	1979	1980	1981	1982	1983
<i>Potemkin</i>	Sovexportfilm	Artkino Pictures, Inc.	x						
<i>Alexander Nevsky</i>	"	"	x						
<i>Crime & Punishment</i>	"	"	x						
<i>Ten Days That Shook the World</i>	"	"	x						
The following TV Public Service Announcements, in the form of videotapes, on U.S.-Japan Trade were distributed by Donald Lerch & Company on behalf of the Government of Japan:									
<i>The Pacific Lifeline</i>					x				
<i>How Exports Create Jobs</i>				x					
<i>Persian Gulf Oil</i>							x		
<i>How We're Selling More to Japan</i>							x		
<i>Ever Sell Overseas?</i>							x		
<i>What is Japan Doing About Energy?</i>							x		
<i>Trade—Who Needs It?</i>							x		
<i>What Makes a Job</i>							x		

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil Action No. S-83-287-RAR

BARRY KEENE, PLAINTIFF

v.

WILLIAM FRENCH SMITH, ET AL., DEFENDANTS

**DEFENDANTS' STATEMENT OF MATERIAL FACTS
NOT IN DISPUTE IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT**

Defendants William French Smith and Joseph E. Clarkson, by their undersigned attorneys, hereby submit pursuant to Rule 116(a) of the rules of this Court Defendants' Statement of Material Facts Not in Dispute in support of defendants' Motion for Summary Judgment.

1. By letter dated January 13, 1983, the Registration Unit of the Internal Security Section of the Criminal Division of the Department of Justice requested that the National Film Board of Canada ("NFBC") comply with the labeling and reporting requirements of Section 4 of the Foreign Agents Registration Act ("the FARA"), 22 U.S.C. § 614, with respect to three films entitled *If You Love This Planet*, *Acid From Heaven*, and *Acid Rain: Requiem or Recovery*. Declaration of Joseph E. Clarkson, submitted in support of Defendants' Memorandum of Points and Authorities In Opposition to Motion for Preliminary Injunction and In Support of Motion to Dismiss, April 25, 1983 ("Clarkson Decl. I"), ¶ 2.

2. The NFBC registered with the Attorney General as an agent of a foreign principal in 1947, pursuant to Section 2 of the FARA, 22 U.S.C. § 612, and has filed supplemental registration statements repeatedly since then, most recent in 1983. *Id.*

3. The NFBC has requested reconsideration of the Department of Justice's determination that the three films are subject to the FARA, and that request is pending. Pending resolution of the request for reconsideration, the NFBC is not attaching the statutory disclaimer to the films required by Section 4(b) of the FARA, 22 U.S.C. § 614(b), nor reporting information regarding the dissemination of the three films in the United States as required by Section 4(a) of the FARA, 22 U.S.C. 614(a). *Id.*, ¶ 3.

4. None of the FARA's provisions, including the FARA's registration, reporting and labeling requirements, apply to plaintiff Barry Keene, and the Department of Justice has at no time required plaintiff to undertake any actions pursuant to the Act, or to refrain from any actions pursuant to the Act. *Id.*, ¶ 4.

5. At no time has the Department of Justice undertaken any actions to prevent plaintiff from obtaining, viewing, or exhibiting the three films. *Id.*

Respectfully submitted,

RICHARD K. WILLARD
Acting Assistant Attorney General

DONALD B. AYER
United States Attorney

/s/ David J. Anderson
DAVID J. ANDERSON

/s/ Surell Brady
SURELL BRADY

/s/ Mona S. Butler
MONA S. BUTLER

Attorneys, Department of Justice
Room 3535—Civil Division
Department of Justice
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 633-5302

Attorneys for Defendants

April 13, 1984

PLAINTIFF'S EXHIBIT A

1. Declaration of Mervin D. Field; background and qualifications of Mervin D. Field.
2. Declaration of Leonard Wood, setting forth results of poll conducted by the Gallup Organization, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

—
No. S-83-287-RAR

BARRY KEENE, PLAINTIFF

—vs—

WILLIAM FRENCH SMITH, and
JOSEPH E. CLARKSON, DEFENDANTS

—
DECLARATION

Mervin Field deposes and says:

1. I have been a survey research practitioner for more than forty years. Currently, I am Founder and Chairman of Field Research Corporation, a commercial market and opinion research agency; President of The Field Institute, a non-profit public policy research organization; and Director of The California Poll, a media sponsored public opinion news service. (See attached vitae.)
2. At the request of John Donhoff, counsel for plaintiff Barry Keene, I designed a series of five questions to be used in a national cross-section survey. Each of the five questions tested the effect resulting from the publicizing of an event associated with a candidate running for the State Legislature.
3. I designed the series of five items with these criteria in mind:
 - a. Each item posed an action which had some potentiality of describing the candidate in a negative light.

- b. Each item on its face conveyed a reasonable degree of plausibility that the event could occur in a political campaign.
 - c. The average time it would take to describe the event to a survey respondent would be relatively short and would be about the same for each item.
 - d. The items would be inserted in one of the national cross-section omnibus surveys conducted by the Gallup Organization.
 4. The results show that each item appears to have a substantial impact on prospective voters in respect to how they would view the candidate being described. In each case, the effect is overwhelmingly negative.
 5. An examination of the survey data shows some variations in respect to regions of the country, but these variations are relatively narrow. On the basis of this evidence, plus many years of comparing California findings with national findings on political and social issues, I would have to conclude that a charge embodied in Item C would have a seriously adverse effect on a California State Legislature candidate's chances if this charge were raised during a campaign.
- I swear under penalty that the foregoing is true and accurate to the best of my knowledge.

/s/ Mervin D. Field
MERVIN D. FIELD
July 6, 1984

VITA

MERVIN D. FIELD

The Field Institute
234 Front Street
San Francisco, California 94111
(415) 781-4921

Field Research Corporation
234 Front Street
San Francisco, California 94111
(415) 392-5763

Born: March 11, 1921

1946 to present—Founder and Chairman, Field Research Corporation

1947 to present—Founder and Director, The California Poll

1975 to present—Founder and President, The Field Institute

1942 to 1945—U.S. Maritime Service

1942—The Gallup Poll, Princeton, New Jersey

1941 to 1942—Opinion Research Corporation, Princeton, New Jersey

Professional and Academic Activities

American Association for Public Opinion Research: Member since 1951; Chairman, Public Relations Committee, 1961-62; Councilman at Large, 1966-67; Member, Standards Committee, 1973-74; Chairman, Standards Committee, 1974-76; President, Pacific Coast Chapter, 1965-66.

National Council of Public Polls, Trustee, 1972-82.

Roper Public Opinion Research Center, University of Connecticut, Advisory Council, 1972 to present.

Council of American Survey Research Organizations, a founding Director, 1975-79.

American Marketing Association, member since 1947, President of San Francisco Chapter, 1958-59.

University of California, Survey Research Center, Advisory Committee, 1975 to present.

World Association for Public Opinion Research, member since 1960.

European Society of Market Research, member since 1980.

Advertising Research Foundation, Director, 1977-78.

U.S. Merchant Marine Academy (1942-43)

University of Missouri (1939-40)

Rutgers University (1938-39)

Awards and Citations

American Association for Public Opinion Research 1979 AAPOR Award for "exceptionally distinguished achievement." Citation accompanying award said in part . . . "Mervin Field has been chief architect of and a successful campaigner for a contemporary code of standards for public opinion research. He is a professional who seems to have always known that high quality work demands a comparable level of personal and corporate conduct. His California Poll has become a trusted source of understanding between politics and its publics. An Advisor to academia, associations and companies, he is a model for the businessman in research, a distinguished political analyst, and the conscience of a profession. . . ."

American Marketing Association (Northern California) *Special Award* to Mervin D. Field and Field Research Corporation for "Outstanding Service to the Profession of Marketing Research" (1971).

American Marketing Association *Citation of Merit* for a Meritorious Contribution to the Development of Marketing through his "Field Index of Advertising Efficiency" (1956).

Publications, Addresses, Reports

Authorized over 1,200 reports by The Field Institute and The California Poll on various aspects of California public opinion, attitudes and behavior (1947-83).

"Political Polling in the United States" (1936-1980, Chapter 10 of the book entitled "Political Opinion Polling," The Macmillan Press Ltd., published October 1983).

"Education as a Political Issue in the 1984 Elections" (California Teachers Association Leadership Conference, October 15, 1983).

"The Changing Face of California: Political, Demographic and Minority Trends" (California State University, Dominguez Hills, the Dimensions of Urban Life Lecture Series, May 19, 1983).

"The Role of Polling in Today's Political Process" (San Jose State University, Department of Journalism and Mass Communications, April 14, 1983).

"Political Surveys and Attitude Research: Straw Polls or Straw Men?" (American Association Attitude Research Conference, January 31, 1983).

"A Review of the 1982 California Statewide Elections—Why Voters Voted The Way They Did" (California Business Roundtable, Los Angeles, November 8, 1982).

Paper regarding certain political campaign practices presented before a hearing of the State of California's Fair Political Practice Commission (Los Angeles, March 29, 1982).

"Presidential Election Polling: Are the States Righter?" (Public Opinion, October/November 1981).

"The 1980 Presidential Election: A Reagan Landslide in the Works?" (The Business Roundtable, Homestead, Virginia, October 11, 1980).

"Public Polls and the Public Interest" (a paper included in Kettering Foundation publication "Polling on the Issues," November 1979).

"Polls and Public Policy" (Journal of Advertising, October 1979).

"Proposition 13—One Year Later" (Taxes & Spending, July 1979, a publication of the Institute of Contemporary Studies).

"Are Political Polls Masters or Servants of the American Political Process?" (Commencement address, Department of Political Science, University of California, Berkeley, June 17, 1979).

"Polling, Political Advocacy and the Public Interest" (American Association for Public Opinion Research Conference, May 31, 1979).

"Polls and Public Policy—Is the Tail Wagging the Dog?" (ARF Public Affairs Conference, Washington, D.C., April 5, 1979).

"Sending a Message: Californians Strike Back" (A review of the history and future of Proposition 13 and its implications for the state and the nation) (Public Opinion, July/August 1978).

"Emerging Ethnic Groups—Problems or Promise" (California's New Majority Symposium, University of California, Irvine, February 1978).

"The Republican Party and the Black Voters" (Republican State Central Committee, Los Angeles, February 3, 1978).

"The Electoral College—Why We Should Keep It" (California State University, and Colleges, SSRIC Seminar, Sonoma State College, May 1977).

"Political Polls and Marketing Research—The Odd Couple" (Market Research Council, New York, April 1977).

"The Role and Performance of the Media in Political Campaigns" (University of California, Berkeley, Symposium, February 18-19, 1977).

"Lower Expectations—Myth or Reality?" (St. Mary's College Executive Symposium, February 1977).

"A Pollster's Retrospective View of the 1976 Presidential Campaign" (University of California, Irvine, December 1976).

"The Role of Foreign Policy in the 1976 Presidential Election" (World Affairs Council, March 1976).

"A New Look at the Public's Response to Nuclear Power" (Public Affairs and Information Committee of the Atomic Industrial Forum, July 1975).

"Are Survey Respondents Really Anonymous?" (Peter Sherrill and Mervin D. Field, FRC Monograph 1974).

"A Long-Term Overview of How the Public Views the Oil Industry" (Public Issues Awareness Seminar, Oakland, September 1974).

"Morality, Moralism and Scandalizing in Today's Politics" (The Public Relations Society of America, San Francisco, June 1974).

"Improving Relations with Our Respondents" (Joint Conference of World Association for Public Opinion Research and the American Association for Public Opinion Research, June 1974).

"Public Opinion Polls: Facts, Predictions and Criticism" (Peter Sherrill and Mervin D. Field, FRC Monograph 1973).

"Working Our Way Out From Under the Avalanche of Travel Research Data" (The Travel Research Association Conference, August 1973).

"The Political Process and the Research Process" (The American Association for Public Opinion Research 28th Conference, May 1973).

"Reading the Fine Print in the Social Contract" (California Management Review, 1973).

"How to Gather Nourishment from Myths, Unconventional Wisdom and Historical Artifacts in Bank Marketing" (The American Bankers Association Marketing Conference, March 1972).

"Consumerism: The Saving Grace of Business" (St. Mary's College Executive Symposium, February 1972).

"Attitude Research for the Industrial Communicator" (The Industrial Communication Council, Inc., Denver, Colorado, October 1971).

"Toward Responsibility in Reporting of Opinion Surveys, The Researcher's View" (Public Opinion Quarterly, Fall 1971).

"Noisy Pluralism vs. The Silent Majority" (American Association for Public Opinion Research Conference, May 1971, Public Opinion Quarterly, Fall 1971).

"A Post-Election Review of the 1970 British Elections with Particular Reference to the Performance and Role of the Public Opinion Polls. A Transatlantic View." (Publication of the University of Strathclyde Survey Research Centre, Glasgow).

"Public Attitudes Toward A Changing Higher Educational System—Some Bad News and Some Good News" (American College Public Relations Association, January 1970).

"Some Reflections of Party Preference, Political Ideological Leanings and Candidate Preferences of California Union Members" (Industrial Relations Research Association, Los Angeles, November 1968).

"Some Thoughts About the Role of Public Opinion Polls in Today's Political and Social Processes" (The American Psychological Association, September 1968).

"The New Shape of American Politics Since November 22, 1963" (Pacific Chapter of the American Association for Public Opinion Research Conference, January 1964).

"Some Reflections on the Role and Effect of Polls in Political Campaigns" (The University of Southern California Chapter Lambda Chi Delta, December 1962).

"Public Reaction to the John Birch Society and Its Impact on California Politics" (Public Opinion Quarterly, The American Association for Public Opinion Research Conference, May 1962).

"Problems and Principles in the Marketing of Marketing Research" (The American Marketing Association, 44th Conference, June 1961).

"Responsibility and Integrity in Marketing Research" (Southern California Chapter of the American Marketing Association, May 1961).

"The Motivation Research Story—Or How the Mustang Got Coralled" (The Public Relations Society of Arizona, March 1960).

"Public Attitudes and Corporate Image Studies" (San Francisco State College Advertising Workshop, June 1959).

"Public Opinion Polls and What They Mean to Marketing Research" (The Southern California Chapter of the American Marketing Association, September 1958).

"Quantitative vs. Qualitative Research" (AAAA 20th Annual Convention, October 1957).

"Is Anybody Reading, Looking or Listening?" (American Association of Advertising Agencies, Del Monte Lodge, 1954).

"Why the Polls Were Wrong in the 1948 Presidential Election and Where They Go From Here" (FRC Monograph, 1948).

GALLUP STUDY OF
THE EFFECT OF CAMPAIGN DISCLOSURES
ON ADULTS' ATTITUDES
TOWARD CANDIDATES

Conducted for:

PRIEST, KATZ, FINEN, AND GAFFANUY

THE GALLUP ORGANIZATION, INC.

53 Bank Street

Princeton, New Jersey 08542

July, 1984

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INTRODUCTION

This is a report on a study conducted by The Gallup Organization, Inc., designed to investigate what effects, if any, various campaign disclosures would have on adults' attitudes toward political candidates.

The specific objectives of the survey were to determine adults' reactions toward a political candidate shown to have:

1. Listed himself as holding a Bachelor of Arts degree from a state university, but records showed he dropped out after his sophomore year;
2. Refused to testify in a court case involving a relative charged with drug dealing;
3. Arranged to show to the public three foreign films that the Justice Department had classified as "political propaganda";
4. Visited some Third World countries against the advice of the State Department;
5. Hidden the fact that he served a short term for robbery when he was a juvenile.

Design of the Research

A representative national sample of 1,010 adults, 18 years of age and older, was interviewed by telephone during the period of June 25-July 1, 1984. The questions were included on a Gallup Telephone Omnibus Survey.

The composition of the sample, design of the sample, and tables of recommended sampling tolerances can be found in the Technical Appendix. A copy of the questionnaire appears on the following page.

THE QUESTIONS ASKED

ASK EVERYONE: "Now on another topic . . ."

I am going to read some things that might occur during a political campaign for a state legislature

seat. As I read each one, please tell me how you would react toward a candidate if such a disclosure were made about him. Would this fact make you more inclined or less inclined to vote for him or wouldn't it make any difference to you? First . . . (START AT "X") *

	More In- clined	Less In- clined	No Dif- ference	DK
a. Suppose it were shown to be true that a candidate had listed himself as holding a Bachelor of Arts Degree from a state university, but a check of the records disclosed that he had dropped out after his sophomore year?	1[]	2[]	3[]	y[]
b. Suppose it were shown to be true that in a federal investigation, the candidate refused to testify in a court case involving a relative of his who was charged with drug dealing.	1[]	2[]	3[]	y[]
c. Suppose it were shown to be true that a candidate had arranged to show to the public three foreign films that the United States Justice Department had officially classified as "political propaganda".	1[]	2[]	3[]	y[]

* In order to minimize potential position bias, interviewers were instructed to start each interview at a different part of the question. For example, if in one interview statement "a" was asked first, then in the next interview, the interviewer would start at statement "b" and ask "b"- "e" and then "a."

- d. Suppose it were shown to be true that a candidate had visited some third world countries, even though the U.S. State Department had advised U.S. citizens not to go to these countries.

1[] 2[] 3[] y[]

- e. Suppose it were shown to be true that a candidate had hidden the fact that he had served a short term for robbery while he was a juvenile.

1[] 2[] 3[] y[]

[3]

DETAILED TABULAR ANALYSIS

The Gallup Organization, Inc.
Princeton, New Jersey

June, 1984
PA-RCE

**** VOTER REACTION TO CAMPAIGN DISCLOSURES ****

Voter reaction towards political candidates due to following campaign disclosures
A. Candidate listed himself as holding a bachelor of arts degree, but records showed he dropped out after sophomore year.

	Education									
	Less Than High School					Mid-west				
	Sex		Age			Col-lege		Region		
	Total	Male	Female	18-34 Years	35-49 Years	50 & Over		East	South	West
Weighted Base	1622 100.0	772 100.0	850 100.0	629 100.0	394 100.0	588 100.0	597 100.0	426 100.0	432 100.0	457 100.0
Inclination to Vote										
More Inclined	38 2.3	20 2.6	19 2.2	16 2.5	3 .8	19 3.2	7 1.2	21 4.9	5 1.2	10 2.2
Less Inclined	944 58.2	480 62.2	464 54.6	383 60.9	257 65.2	300 51.0	442 74.0	246 57.7	249 57.6	281 61.5
No Difference	537 33.1	239 31.0	298 35.1	211 33.5	123 31.2	200 34.0	131 21.9	138 32.4	156 36.1	141 30.9
Don't Know	101 6.2	32 4.1	69 8.1	20 3.2	10 2.5	69 11.7	17 2.8	21 4.9	23 5.3	26 5.7
Number of Interviews (Percentages Rounded)	1010	497	513	446	265	291	469	267	299	275
0001										139

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The Gallup Organization, Inc.
Princeton, New Jersey

June, 1984
PA-RCE

**** VOTER REACTION TO CAMPAIGN DISCLOSURES ****

Voter reaction towards political candidates due to following campaign disclosures
B. Candidate refuses to testify in court case involving a relative charged with drug dealing.

	Education									
	Less Than High School					Mid-west				
	Sex		Age			Col-lege		Region		
	Total	Male	Female	18-34 Years	35-49 Years	50 & Over		East	South	West
Weighted Base	1622 100.0	772 100.0	850 100.0	629 100.0	394 100.0	588 100.0	597 100.0	426 100.0	432 100.0	457 100.0
Inclination to Vote										
More Inclined	50 3.1	31 4.0	19 2.2	17 2.7	15 3.8	17 2.9	12 2.0	13 3.1	12 2.8	12 2.6
Less Inclined	838 51.7	409 53.0	428 50.4	304 48.3	204 51.8	329 56.0	263 44.1	211 49.5	247 57.2	239 52.3
No Difference	581 35.8	286 37.0	295 34.7	279 44.4	155 39.3	142 24.1	295 49.4	160 37.6	146 33.8	113 25.7
Don't Know	153 9.4	45 5.8	108 12.7	29 4.6	20 5.1	100 17.0	26 4.4	42 9.9	28 6.5	43 9.4
Number of Interviews (Percentages Rounded)	1010	497	513	446	265	291	469	267	299	275
0002										169

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The Gallup Organization, Inc.
Princeton, New Jersey

June, 1984
PA-RCE

**** VOTER REACTION TO CAMPAIGN DISCLOSURES ****

Voter reaction towards political candidates due to following campaign disclosures
C. Candidate arranged to show to public three foreign films that the Justice Dept. had classified as "Political Propaganda".

	Education									
	Less Than High School					Region				
	Total	Sex	Age	Col- lege	High School	East	Mid- west	South	West	
Weighted Base	1622	Male 772	18-34 Years 629	50 & Over 588	700	324	432	457	306	
Inclination to Vote	100.0	Female 850	35-49 Years 394	100.0	100.0	100.0	100.0	100.0	100.0	
More Inclined	112	63	67	19	32	20	26	22	20	
Less Inclined	6.9	8.2	10.7	3.2	4.6	6.2	6.0	4.8	6.5	
No Difference	797	406	294	307	369	159	228	245	140	
Don't Know	49.1	52.6	46.7	52.2	52.7	49.1	52.8	53.6	45.3	
Number of Interviews (Percentages Rounded)	466	219	216	127	190	59	124	118	91	
	28.7	28.4	34.3	21.6	27.1	18.2	28.7	25.8	29.7	
	247	84	52	135	109	85	55	71	55	
	15.2	10.9	8.3	23.0	15.6	26.2	12.7	15.5	18.0	
	1010	497	446	291	401	139	299	275	169	

0003

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The Gallup Organization, Inc.
Princeton, New Jersey

June, 1984
PA-RCE

**** VOTER REACTION TO CAMPAIGN DISCLOSURES ****

Voter reaction towards political candidates due to following campaign disclosures
D. Candidate visited some third world countries against the advice of the U.S. State Dept.

Education

	Education									
	Less Than High School					Region				
	Total	Sex	Age	Col- lege	High School	East	Mid- west	South	West	
Weighted Base	1622	Male 772	18-34 Years 629	50 & Over 588	700	324	432	457	306	
Inclination to Vote	100.0	Female 850	35-49 Years 394	100.0	100.0	100.0	100.0	100.0	100.0	
More Inclined	126	54	81	22	49	22	31	24	23	
Less Inclined	7.8	7.0	12.9	3.7	7.0	6.8	7.2	5.3	7.5	
No Difference	762	369	238	335	348	166	212	251	117	
Don't Know	47.0	47.8	37.8	57.0	49.7	51.2	49.1	54.9	38.2	
Number of Interviews (Percentages Rounded)	581	296	278	144	243	74	151	139	134	
	35.8	38.3	44.2	24.5	34.7	22.8	35.0	30.4	43.8	
	152	52	32	87	60	61	39	44	32	
	9.4	6.7	5.1	14.8	8.6	18.8	9.0	9.6	10.5	
	1010	497	446	291	401	139	299	275	169	

0004

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The Gallup Organization, Inc.
Princeton, New Jersey

June, 1984
PA-RCE

**** VOTER REACTION TO CAMPAIGN DISCLOSURES ****

Voter reaction towards political candidates due to following campaign disclosures
E. Candidate had hidden fact that he had served a short term for robbery while he was a juvenile.

	Sex		Age				Education		Region			
	Total	Male	Female	18-34 Years		35-49 Years	50 & Over	Col-lege	Less Than High School		Mid-west	South East
				Years	Years				High School	High School		West
Weighted Base	1622	772	850	629	394	588	597	700	324	426	432	457
Inclination to Vote	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
More Inclined	43	20	23	22	7	14	10	24	8	13	5	12
Less Inclined	2.7	2.6	2.7	3.5	1.8	2.4	1.7	3.4	2.5	3.1	1.2	2.6
No Difference	747	373	374	280	196	269	284	326	138	200	184	237
Don't Know	46.1	48.3	44.0	44.5	49.7	45.7	47.6	46.6	42.6	46.9	42.6	51.9
	731	344	387	315	173	238	278	310	141	184	222	181
	45.1	44.6	45.5	50.1	43.9	40.5	46.6	44.3	43.5	43.2	51.4	39.6
	101	34	66	13	18	67	25	39	37	29	21	28
	6.2	4.4	7.8	2.1	4.6	11.4	4.2	5.6	11.4	6.8	4.9	6.1
Number of Interviews (Percentages Rounded)	1010	497	513	446	265	291	469	401	139	267	299	275
0005												169

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[4]
TECHNICAL APPENDIX

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COMPOSITION OF THE SAMPLE

<i>Sex of Respondent</i>	<i>Percent</i>
Male	47.6
Female	52.4
	100.0
<i>Age of Respondent</i>	
18-34 years	38.8
35-49 years	24.3
50 and older	36.3
Undesignated	.6
	100.0
<i>Education of Respondent</i>	
College	36.8
High school graduate	43.2
Less than high school graduate	20.0
	100.0
<i>Region</i>	
East: Maine, New Hampshire, Rhode Island, Connecticut, Vermont, Massachusetts, New York, New Jersey, Pennsylvania, West Virginia, Delaware, Maryland, District of Columbia	26.3
Midwest: Ohio, Indiana, Illinois, Michigan, Minnesota, Wisconsin, Iowa, North Dakota, South Dakota, Kansas, Nebraska, Missouri	26.6
South: Kentucky, Tennessee, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Texas, Arkansas, Oklahoma, Louisiana	28.2
West: Arizona, New Mexico, Colorado, Nevada, Montana, Idaho, Wyoming, Utah, California, Washington, Oregon, Alaska, Hawaii	18.9
	100.0

Gallup's Telephone Sample Design

Gallup's standard telephone sampling procedures were used for this study. The Gallup national telephone sample is a probability sample of all telephone households in the Continental United States. The sample is selected in a multi-stage process that ensures geographic representativeness, proportional representation of households with listed and unlisted telephone numbers, and efficient identification of working, residential telephone numbers.

At the first sampling stage, a stratified sample of primary sampling units (PSUs) consisting of cities, towns and the rural portions of counties is selected. All places in the United States are stratified into seven size-of-place strata and each stratum is further stratified by region. The seven size strata are—(a) cities of 1,000,000 or more population, (b) cities of 250,000 to 999,999 population, (c) cities of 50,000 to 249,999 population, (d) other urbanized places not included in (a)-(c) above, (e) other cities and towns of 2,500 or more population, (f) towns and villages of population less than 2,500 and (g) rural parts of counties. The PSUs are selected with probabilities proportional to their population size.

At the second sampling stage, a constant number of telephone households is sampled within each PSU. The two sampling stages together produce a final sample in which the selected households have equal probabilities of selection. The second stage telephone numbers are generated randomly from within working banks of telephone numbers in the PSU. Information on which telephone banks contain working numbers is derived from two sources: the Gallup Personal Omnibus Survey database and published telephone directories. In effect, each [7] telephone number reported by a respondent interviewed as part of the Gallup Personal Omnibus Survey in these same PSUs selects an exchange and a bank of 100 numbers for the Gallup Telephone Sample. This procedure provides a national sample of telephone exchange with

representation proportional to the incidence of residential listings by exchange and a sample of exchanges which is up to date in terms of all working numbers, both listed and unlisted. Since the exchanges are selected from the locations drawn with stratification by region, city size, and rural-urban, the net effect is a similar stratification of exchanges.

Numbers for telephone samples are randomly generated in the following manner from each exchange and bank of numbers so selected: Assume that one of the numbers obtained from the sample of households for a personal interview survey has a suffix of 4731. Eliminating this number, an interviewer would then be assigned four numbers in succession from the bank of 100 numbers between 4700 and 4799—say 4732, 4733, 4734, 4735. A single interview is to be obtained from this set of numbers. These generated numbers may include unlisted numbers, not found in telephone directories. Starting with the first number (4732), the interviewer works through the four numbers until an interview is completed. If an interview cannot be obtained from this block, an additional block is assigned. The telephone numbers obtained in our personal interview surveys are augmented, if necessary, by numbers generated from seed numbers drawn from directories. When such augmentation is required, seed numbers are drawn randomly subject to the requirement that they reflect the same distribution of exchanges as found in the numbers elicited in our personal interview surveys.

[8] Within each contacted household, an interview is sought with the youngest man 18 years or older who is at home. If no man is at home, an interview is sought with the oldest woman at home. In addition, a sex quota is assigned for each PSU. This method of respondent selection within households produces an age distribution by sex that closely approximates the age distribution of the total population.

Up to three calls are made to each selected telephone number in order to complete an interview. The time of day and the day of the week for callbacks is varied so as to maximize the chances of finding a potential respondent at home. All interviews are conducted on weekends or weekday evenings so that potential respondents who work full-time can be contacted.

The final sample is weighted so that the age by sex by education by region distribution of the sample matches current estimates derived from a combination of information from the U.S. Census Bureau for the total adult population and from the Gallup Omnibus database concerning the demographic differences between telephone and non-telephone households.

[9]

SAMPLING TOLERANCES

In interpreting survey results, it should be borne in mind that all sample surveys are subject to sampling error, that is, the extent to which the results may differ from what would be obtained if the whole population surveyed had been interviewed. The size of such sampling errors depends largely on the number of interviews.

The following tables may be used in estimating the sampling error of any percentage in this report. The computed allowances have taken into account the effect of the sample design upon sampling error. They may be interpreted as indicating the range (plus or minus the figure shown) within which the results of reported samplings in the same time period could be expected to vary, 95 per cent of the time, assuming the same sampling procedure, the same interviewers, and the same questionnaire.

The first table shows how much allowance should be made for the sampling error of a percentage:

Recommended Allowance For Sampling Error
of a Percentage

In Percentage Points
(at 95 in 100 confidence level) *

	1000	750	600	400	200	100
Percentages near 10	2	3	3	4	5	7
Percentages near 20	3	4	4	5	7	9
Percentages near 30	4	4	4	6	8	10
Percentages near 40	4	4	5	6	8	11
Percentages near 50	4	4	5	6	8	11
Percentages near 60	4	4	5	6	8	11
Percentages near 70	4	4	4	6	8	10
Percentages near 80	3	4	4	5	7	9
Percentages near 90	2	3	3	4	5	7

The table would be used in the following manner: Let us say a reported percentage is 33 for a group which includes 1,000 respondents. Then we go to row "percentages near 30" in the table and go across to the column headed "1,000." The number at this point is 4, which means that the 33 per cent obtained [10] in the sample is subject to a sampling error of plus or minus 4 points. Another way of saying it is that very probably (95 chances out of 100) the average of repeated samplings would be somewhere between 29 and 37, with the most likely figure the 33 obtained.

In comparing survey results in two samples, such as, for example, men and women, the question arises as to how large must a difference between them be before one can be reasonably sure that it reflects a real difference. In the tables below, the number of points which must be allowed for in such comparisons is indicated.

Two tables are provided. One is for percentages near 20 or 80; the other for percentages near 50. For percent-

* The chances are 95 in 100 that the sampling error is not larger than the figures shown.

ages in between, the error to be allowed for is between those shown in the two tables:

Recommended Allowance for Sampling Error
of the Difference

In Percentage Points
(at 95 in 100 confidence level) *

TABLE A Percentages near 20 or percentages near 80

Size of Sample	750	600	500	400	200
750	5				
600	5	6			
500	6	6	6		
400	6	6	7	7	
200	8	8	8	8	10

TABLE B Percentages near 50

Size of Sample	750	600	500	400	200
750	6				
600	7	7			
500	7	7	8		
400	7	8	8	9	
200	10	10	10	10	12

Here is an example of how the tables would be used: Let us say that 50 per cent of men respond a certain way and 40 per cent of women respond that way also, for a difference of 10 percentage points between them. Can we say with any assurance that the 10-point difference reflects a real difference between men and women on the question? The sample contains approximately 500 men and 500 women.

[11] Since the percentages are near 50, we consult Table B, and since the two samples are about 500 persons each, we look for the number in the column headed "500" which is also in the row designated "500". We find the number 8 here. This means that the allowance for error should be 8 points, and that in concluding that the per-

* The chances are 95 in 100 that the sampling error is not larger than the figures shown.

centage among men is somewhere between 2 and 18 points higher than the percentage among women we should be wrong only about 5 per cent of the time. In other words, we can conclude with considerable confidence that a difference exists in the direction observed and that it amounts to at least 2 percentage points.

If, in another case, men's responses amount to 22 per cent, say, and women's 24 per cent, we consult Table 4 because these percentages are near 20. We look in the column headed "500" and see that the number is 6. Obviously, then, the 2-point difference is inconclusive.

QUALIFICATIONS OF THE GALLUP ORGANIZATION, INC.

The Gallup Organization, Inc. is a full-service survey research firm specializing in attitude and opinion research. We have conducted surveys for business, government, associations and foundations covering the broadest spectrum of issues. We have had experience in designing surveys to be administered in a single community, a state, a region of the country, nationwide and worldwide. Gallup regularly conducts custom surveys using personal interviews, telephone interviews and mail surveys and has extensive experience designing and executing both modified-probability and full-probability sample designs. Our experience includes interviewing both the general public and specific groups like medical doctors, congressmen, religious leaders, chief executive officers of the top Fortune 500 companies, food stamp recipients, Hispanics, Blacks, Catholics, completers of vocational education, and many other groups. This broad range of experience in designing and executing surveys of all kinds makes Gallup well qualified to conduct surveys on virtually any topic.

LEONARD A. WOOD
Vice Chairman
The Gallup Organization, Inc.

Leonard Wood is Vice Chairman and Joint Chief Operating Officer of The Gallup Organization, Inc. During Mr. Wood's fifteen years with The Gallup Organization, he has had a broad range of experience in attitude research. His responsibilities and experience include the development and design of Gallup research services to which major business corporations, government agencies, labor unions, and trade and professional associations have subscribed.

In addition, he has been responsible for directing many of The Gallup Organization's largest public opinion projects. Recent major surveys include:

American Public Opinion and U.S. Foreign Policy 1979 conducted for the Chicago Council on Foreign Relations;

Attitudes Toward Multinational Corporations—The General Public, The Media, Congress—A multi-client sponsored project of The Gallup Organization;

Public Attitudes Concerning Government Regulation of Business.

Mr. Wood is a graduate of Rutgers University with a B.A. in Psychology, and Rider College with an M.B.A. in Marketing. He is a member of the American Marketing Association and the American Association for Public Opinion Research. His professional writing has dealt with both public opinion and marketing problems.

I declare under penalty of perjury that the foregoing is to the best of my knowledge true and correct.

/s/ Leonard A. Wood
LEONARD A. WOOD, Vice Chairman,
The Gallup Organization

July 4, 84
DATE

PLAINTIFF'S EXHIBIT B
DECLARATION OF LEONARD W. DOOB

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-0672

MITCHELL BLOCK, ET AL., PLAINTIFFS

v.

WILLIAM FRENCH SMITH, ET AL., DEFENDANTS

State of Connecticut)
County of New Haven)

DECLARATION

LEONARD W. DOOB, under penalty of perjury, declares:

1. I am Senior Research Associate and Sterling Professor Emeritus of Psychology at Yale University. My professional experience for the last 49 years has involved, *inter alia*, the study of the techniques of and responses to propaganda. I have published numerous articles and books, a list of which is included in my curriculum vitae which is attached hereto. Many of them have addressed the subject of propaganda, in particular my doctoral dissertation at Harvard University (1934), "Psychological Factors in Propaganda"; "Propaganda" (Holt, 1935); "Public Opinion and Propaganda" (Holt, 1948, Archon, 1966); "Communications in Africa" (Yale, 1961).

2. I have been consulted by attorneys for the American Civil Liberties Union who have requested that I address the meaning of the concept "propaganda", based on my experience in studying this.

3. On the basis of my study of propaganda, it is my judgment that the designation "political propaganda" of a film or book by the government is pejorative, denigrating to the material, and stigmatizing to those disseminating it. According to a distinguished writer, O.W. Riegel almost 50 years ago, "As the word is commonly used in America, propaganda connotes deceit or disguise in motives or source . . ." ("Mobilizing for Chaos," Yale University Press, 1934, p. 199). In brief, as the history of the last seventy years suggests, to call something propaganda is to assert that it communicates hidden or deceitful ideas; that concealed interests are involved; that unfair or insidious methods or being employed; that its dissemination is systematic and organized in some way which distinguishes it from, for example, the simple release of films or magazines in this country; and that some manipulation is involved. In short, "propaganda" has taken on a pejorative meaning so that a film designated as "political propaganda" would be understood to be something far different from a film simply designated as "a documentary". The following provides support for this conclusion.

4. Although the word "propaganda" has a respectable origin (Congregatio de Propaganda Fide which has been operating from the Vatican since 1622), it has acquired during this century, at least in the English-speaking world, the negative connotations mentioned by Riegel. In the definitive book on "Propaganda Technique in the World War" (i.e., World War I), Professor Harold D. Lasswell included "propaganda" among the "three chief implements of operation against a belligerent enemy" (Knopf, 1927); and by and large his analysis consists of exposing lies or exaggerations.

5. The United States Government has avoided the word "propaganda" as it has established various organizations to affect enemy, friendly, and neutral countries through the mass media. In World War I, the official bureau was called the "Committee on Public Informa-

tion"; in World War II, first the "Office of Facts and Figures," then the "Office of War Information" (for some purposes the "Office of Strategic Services" was utilized); and since then under various names "United States Information Service," "United States Information Agency," and the "International Communication Agency."

6. From 1941 before Pearl Harbor and until the fall of 1945 I worked in various United States government agencies concerned with the transmission of news and other data throughout the world: the Office of the Coordinator of Inter-American Affairs, Military Intelligence of the War Department, and the Office of War Information. We avoided the word "propaganda" to describe ourselves, especially since Dr. Joseph Goebbels had assumed the title of "Minister of Propaganda and Public Enlightenment." We said we were engaging in 'psychological warfare' or we used the equivalent expression of the British, "political warfare." One exception in Washington was the "Propaganda Branch" of Military Intelligence which quickly went out of existence at the start of 1942.

7. In academic circles the word "propaganda" has been shunned since World War II. For a while there were courses in American universities called propaganda analysis. I used the term in the title of a book as late as 1948 for that reason ("Public Opinion and Propaganda": Holt), but I noted that "An effective way in Anglo-Saxon society to insult, belittle, or expose a man is to call him a propagandist" (p. 231); I contrasted "propaganda" and "education." Almost without exception we have substituted the neutral concept of "communication"; thus by 1961 I titled a book "Communication in Africa" (Yale). The vast body of empirical research by academic scholars on changing human attitudes and knowledge falls under the heading of "communication"; thus the first significant summary of these investigations was called "Communication and Persuasion: Psychological Studies of Opinion Change" (Hovland et al.: Yale 1953) and a very recent discussion has the title of "To Inform or to Control?

The New Communications Network," without even a reference to "propaganda" in its index (Ganley and Ganley: McGraw-Hill, 1982).

8. A fairly but not absolutely complete search through the files of the Roper Center at Yale University (which is a repository of survey-data from the United States and other countries) reveals that survey organizations at the moment do not use the word "propaganda" in the questions they pose to representative samples of Americans, undoubtedly because they wish to avoid the biasing effect of the concept. The most recent appearance of the concept appeared in a Gallup poll in May 1966 which asked respondents how satisfied they were with "American success in the world-wide propaganda war—that is, the war of ideas." Previous uses by Gallup included another reference to "the 'propaganda war'" (January 1962) and "money that we are now spending to offset Russian propaganda" (July and August 1950).

9. Designating material as "political propaganda," therefore, denigrates the material and stigmatizes those conveying it, in a manner that mere designation of the material as "political advocacy" would not. It is my professional judgment that knowledge of such a designation would be extremely likely to deter persons from viewing or reading such materials and, diminish and/or slant its communicative value, in a manner likely to make the reader or viewer suspicious of the material, far less likely to credit it or accept its conclusions.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 3, 1983.

/s/ Leonard W. Doob
LEONARD W. DOOB

CURRICULUM VITAE

Leonard W. Doob

Box 11A, Yale Station, New Haven, CT 06520, U.S.A.

Present positions: Yale University: Senior Research Associate, Institution for Social and Policy Studies; Sterling Professor Emeritus, Psychology. Editor, *Journal of Social Psychology*

Past positions:

- a. Instructor in sociology, Dartmouth College (1932-33) Director, Division of Social Science, Yale University (1963-66; 1974-77)
- b. Research Associate or Visiting Professor at the following African Universities: Makerere, Uganda (1954 and 1961); Natal (1955); Tanzania (1960-61); Legon, Ghana (1971).
- c. During World War II: various positions in the United States Government pertaining to psychological warfare, finally Policy Coordinator, Office of War Information (1940-5)

Education: B.A., Dartmouth College; M.A., Duke University; Ph.D., Harvard University

Professional organizations: American Psychological Association (1953-63); African Studies Association (1956-72); American Academy of Arts and Sciences (1966); Society for Cross-Cultural Research (1972).

Publications:

a. *Books:*

Propaganda: its psychology and technique (Holt, 1935); (with M.A. May) Competition and coop-

eration (Social Science Research Council, 1937); (with J. Dollard et al.) Frustration and aggression (Yale University Press, 1939); The plans of men (Yale University Press, 1940); Public opinion and propaganda (Holt, 1948); Social psychology: an analysis of behavior (Holt, 1952); Becoming more civilized: a psychological exploration (Yale University Press, 1960); Communication in Africa: A search for boundaries (Yale University Press, 1961); Patriotism and nationalism: their psychological foundations (Yale University Press, 1964); Public opinion and propaganda (revised edition, Archon Books, 1966); Ants will not eat your fingers: a selection of traditional African poems (Walker, 1966); A crocodile has me by the leg (Walker, 1967); The plans of men (revised edition Archon, 1968); Resolving conflict in Africa (Ed.) (Yale University Press, 1970); Patterning of time (Yale University Press, 1971); Pathways to people (Yale University Press, 1975); Panorama of evil (Greenwood, 1978); "Ezra Pound Speaking" (Greenwood, 1978); Pursuit of peace (Greenwood, 1981).

b. *Articles:* ca. 65

The analysis and resolution of international disputes (*Journal of Psychology*, 1974, 86, 313-326); Time: culture and social anthropological aspects (In: Nigel Thrift, *Time spacing and spacing time*. London: Edward Arnold, 1978. Pp. 56-65); The inconclusive struggles of cross-cultural psychology (*Journal of Cross-Cultural Psychology*, 1980, 11, 59-73); (with D.R. DeLuca, et al.) Risks and benefits perceptions, acceptability judgments, and self-reported actions toward nuclear power (*Journal of Social Psychology*, 1982, 116, 179-197).

PLAINTIFF'S EXHIBIT C
DECLARATION OF EDWIN NEWMAN

**UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF COLUMBIA**

Civil Action No. 83-0672

MITCHELL BLOCK, ET AL., PLAINTIFFS

v.

WILLIAM FRENCH SMITH, ET AL., DEFENDANTS

State of New York)
 County of New York)

Declaration

EDWIN NEWMAN, under penalty of perjury, declares:

1. I am a correspondent for NBC News. I have written two books, *Strictly Speaking* and *A Civil Tongue*, about American English, both of them best sellers. I have written dozens of newspaper and magazine articles on American English, and have lectured extensively on that subject in many parts of the country for the last eight years. In addition, I am head of the Usage Panel of the American Heritage Dictionary.

2. I have been asked by attorneys for the American Civil Liberties Union to give my opinion of the meaning and general understanding of the word "propaganda."

3. It is my opinion that, whatever its origin, propaganda has become a "dirty word." The general understanding of it, I think, has gone beyond the dictionary definition, which is that propaganda is "the systematic propagation of a given doctrine" or, more commonly,

"material disseminated by the advocates of a doctrine." The general understanding, I believe, is that when something is labeled propaganda, it should be looked at closely and with suspicion. Indeed, calling something propaganda amounts, for all practical purposes, to saying that it is not worth considering, that it is to be dismissed. This view is supported by President Reagan's use of the word in his address to a joint session of Congress on April 27, 1983. Speaking of Nicaragua, he said: "Contrary to propaganda, the opponents of the Sandinistas are not die-hard supporters of the previous Somoza regime."

4. Propaganda, in short, is not a neutral word. It is taken to mean not simply that a particular point of view is being put forward, but that it is being put forward with ulterior motives and as part of an attempt to mislead those to whom the propaganda is directed.

5. I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 28, 1983

/s/ Edwin Newman
EDWIN NEWMAN

PLAINTIFF'S EXHIBIT D

DECLARATION OF BARRY KEENE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. S-83-287-RAR

BARRY D. KEENE, PLAINTIFF

vs.

WILLIAM FRENCH SMITH, and
JOSEPH E. CLARKSON, DEFENDANTS

DECLARATION OF BARRY KEENE AS REGARDS
HAVING EXHIBITED THE THREE FILMS

I, BARRY D. KEENE, am the plaintiff in the above-entitled action. I intend to continue to exhibit the three films periodically in the future, but only if the defendants are permanently enjoined from classifying the films as "political propaganda".

After obtaining a preliminary injunction May 23, 1983 forbidding the defendants from classifying the three films *If You Love This Planet*, *Acid Rain: Requiem or Recovery*, and *Acid From Heaven*, as political propaganda, or from referring to the films as such, or in any way treating the films a subject to the FARA, I arranged to exhibit the films.

The films were exhibited in an auditorium in the basement of the West Wing of the State Capitol Building, Sacramento, California, beginning at noon on July 6, 1983, to a standing room only audience of the general public and legislative staff.

I attended the screening and addressed the audience in terms supportive of the need to seriously consider the

information conveyed by the films and the issues the films addressed. The audience was informed that I was responsible for showing the films, and that I did so at that time because the district court's action was then, as now, preventing the government from classifying the films as political propaganda.

I, BARRY KEENE, plaintiff in the above entitled action, state under penalty of perjury that this is a true and accurate recitation of the facts surrounding my exhibition of the three films.

Sworn to this day 11/23/83.

/s/ Barry Keene
BARRY KEENE

PLAINTIFF'S EXHIBIT E

**CONFERENCE REPORT: AB 406
SENATE DEMOCRATIC AND REPUBLICAN CAUCUS
JOINT ANALYSIS**

Bill AB 406

Author Davis

**CONFERENCE REPORT
SENATE DEMOCRATIC AND REPUBLICAN CAUCUS
JOINT ANALYSIS**

Subject: **RN** _____

Subject of bill before Conference:

Did a policy committee or a fiscal committee hear this issue? Yes ☒ Which One? _____ No _____

Did any committee defeat the issue? Yes _____
Which one? _____ No ☒

Summary:

This measure imposes a requirement that candidates sign a "Fair Campaign Agreement" pledge prior to receiving any funds from the California Election Campaign Fund, a moderate source of public funding previously established with the institution of a voluntary "add-on" of contribution on the state income tax form.

The most significant element of the Agreement is the requirement that any campaign materials containing reference to the opposition be submitted to the opponent, and to newspapers within the district, prior to dissemination. Mail pieces must be submitted 24 hours in advance of mailing; media ads must be submitted 48 hours prior to broadcast. Only text must be submitted in the case of printed pieces—not pictures or layout.

Senate amendments were essentially non-controversial, dealing with tye [*sic*] types of newspapers which would receive the pre-disclosed material.

Fiscal Impact:

Some administrative costs relating to the distribution of public funds—minor.

* This report is prepared with the assistance of the policy committee staffs and the Legislative Analyst.

Democratic Caucus ——— Republican Caucus ———
Policy Committee ———

PLAINTIFF'S EXHIBIT F

**LETTER TO THE
HONORABLE ROBERT W. KASTENMEIER**

**Chairman
Subcommittee on Courts, Civil Liberties
and the Administration of Justice**

**From
Edward C. Schmults**

U.S. Department of Justice
Office of the Deputy Attorney General

Washington, D.C. 20530

The Deputy Attorney General

August 8, 1983

Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil
Liberties and the Administration
of Justice
U.S. House of Representatives
Washington, D.C. 20515

Dear Bob:

This is in response to your letter of April 5, 1983, requesting my comments on H.R. 1969, a bill to amend the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. 611, *et seq.* (FARA or the Act). Rather than comment informally, I feel that a somewhat fuller explanation of the views of the Department of Justice might facilitate consideration of this matter by your Subcommittee.

H.R. 1969 would strike certain terms and subsections from Sections 1 and 4 of the Act including the definitions of "political activities" and "political propaganda" and make certain other conforming changes to the Act. You indicate that your intent in the suggested changes is to eliminate the role of the Justice Department in reviewing and labeling films and other materials transmitted by "agents of a foreign principal" registered under FARA.

H.R. 1969 would eliminate in their entirety the current requirements of § 4(a) and § 4(b) of the FARA that foreign agents must: (1) file with the Attorney General two copies of any works of "political propaganda they have disseminated," along with a report setting forth the "places, times, and extent" of their dissemination; and

(2) plainly mark such items of political propaganda with a disclosure statement setting forth identifying information concerning the agency relationship and the registration statement along with a disclaimer of approval by the United States Government of the content of the political propaganda.

As you know, FARA is a disclosure statute designed to enlighten the public as to the scope of political activities conducted by agents on behalf of foreign principals. We believe that the limited focus of the Act on political activities of a foreign agent is in the public interest. We would oppose elimination of the definition of "political activities," because this would (perhaps unintentionally) eliminate the basis for determining the scope of the Act. Thus, if H.R. 1969 were enacted, § 1(c) of the Act would continue to define an "agent of a foreign principal" in part as a person engaged in "political activities," but there would be no statutory explanation of that term. Similarly, the crucial § 3(d)(1) exemption for persons engaged in commercial and "non-political" activities, which limits the Act's otherwise broad applicability to "public relations counsel," "publicity agents" and "information service employees," would be left in a state of uncertainty. In sum, while we would not oppose the development of a more concise and appropriate definition of political activities (including, for instance, deletion of the current reference to "political propaganda"), we do oppose eliminating this definition in its entirety.

The Department would support your proposal to eliminate the specific filing and reporting requirements imposed by § 4(a) of the Act, since the public interest in knowing generally the identity and activities of agents is adequately served by the more general semi-annual reporting requirements of § 2 of the Act.* We would not,

* In this regard, we do not understand the purpose of the bill's proposed elimination of language in 2(a)(6) of the Act specifically referring to political activities, since other provisions of § 2 unaf-

however, support the complete elimination of the disclosure "labelling" requirements of § 4(b) of the Act, since we believe that the public does have an important interest in knowing the foreign principal on whose behalf political advocacy materials are being disseminated. For the same reason we cannot support elimination of § 4(e). We would, however, favor amending the Act to permit use of simpler and more neutral language in the disclosure label, to avoid unnecessary negative connotations that may be inferred from the disclosure statement (as, for instance, from the current statement that the United States Government has not approved the contents of the message).

If some kind of labelling requirement is to be retained, it will continue to be necessary to include with the Act a definition of those materials which must be labelled. We believe Congress should, however, consider replacing the broad definition of "political propaganda," which currently defines materials that must be labelled, with a more concise definition, more narrowly focused on the United States political process. We would also support the use of a more neutral term like political "advocacy" or "information" to denominate information that must be labelled.

Admittedly, retention of any kind of a labelling requirement poses a difficult legislative problem in defining precisely what information is subject to the requirement, as well as an enforcement problem for the Department of Justice in construing whatever definition is enacted by Congress. While we would not object to a statute which avoided this problem by requiring that all information disseminated by an agent engaged in political activities be labelled as to source, we recognize that this would

affected by H.R. 1969 would clearly include political activities within their reporting requirements. If the intent is to eliminate the requirement that registrants include disclosure of covered political activities in their semi-annual reports, we would oppose this amendment.

impose a broader practical burden on agents than a statute requiring source labelling only for political information.

While we believe H.R. 1969 requires some modification, we stand ready to work with you to address the legitimate concerns raised by the application of the Act to the Canadian films.

The Office of Management and Budget advises that there is no objection to the presentation of this report to the Congress from the standpoint of the Administration's program.

Sincerely,

/s/ Edward C. Schmults
EDWARD C. SCHMULTS

PLAINTIFF'S EXHIBIT G

**SACRAMENTO BEE EDITORIAL, JUNE 19, 1984
"MOSCOW HEARS SOMETHING"**

MOSCOW HEARS SOMETHING

One would think that, with nearly 70 years of practice, the Soviet Union would have become a little less heavy handed in its propaganda, if not more sophisticated. But here it is again, running out the old agit-prop rhetoric, declaring that Andrei Sakharov, the world's best-known political prisoner, is happy and well in his forced exile in Gorki. There is no hunger strike says Tass: Sakharov feels fine, takes regular meals and lives an active life. All charges that he and his wife, Yelena Bonner, are both ill are "an unseemly propaganda farce" promulgated by the Western press.

That sort of heavy-handed stuff is only possible, of course, where the propagandist has little fear of being questioned, or challenged, where there is no compelling need to provide evidence, and where his arrogance therefore is unchecked by his listeners or competing voices.

Still, the fact that the Soviets feel the need to say anything at all about Sakharov and Bonner suggests that in some indirect way what is being said again and again in the West about this courageous couple and their treatment by the Soviet government is having some impact, even now when the walls between East and West are so high. It may not help Sakharov much, let alone Russia's other dissidents, but at least the protests abroad have attracted Moscow's attention.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. S-83-287-RAR

BARRY D. KEENE, PLAINTIFF

vs.

WILLIAM FRENCH SMITH, and
JOSEPH E. CLARKSON, DEFENDANTS

[Filed July 9, 1984]

**PLAINTIFF'S STATEMENT OF
MATERIAL FACTS NOT IN DISPUTE**

Plaintiff BARRY D. KEENE, by his undersigned counsel, hereby submits Plaintiff's Statement of Material Facts Not in Dispute in support of Plaintiff's Motion for Summary Judgment.

1. Plaintiff incorporates by reference paragraphs 1 and 2 of Defendants' Statement of Material Facts Not in Dispute and agrees that those paragraphs set forth facts not in dispute. Paragraphs 3, 4, and 5 of Defendants' Statement are either irrelevant, or unsupported by the undisputed facts set forth below.

2. The National Film Board of Canada has requested reconsideration of the Department of Justice's application of the reporting and labeling requirements to the three films. Reconsideration is pending.

3. This Court on May 23 of 1983, issued an Order enjoining defendants from classifying the three films as "political propaganda", or in any other way treating those films as subject to FARA's labeling or reporting requirements.

4. Plaintiff is a California State Senator, who represents the Senate in the Second Senatorial District. He is also Chairman of the State Senate Committee on the Judiciary, a member of the California State Bar, and "of Counsel" to Tobin & Tobin, a San Francisco law firm.

5. In addition to the facts in the record noted above, this Court found the following facts to be true in its Findings of Fact and Conclusions of Law issued September 8, 1983:

a) "Political propaganda" is ordinarily and commonly understood to mean material that contains half-truths, distortions, and omissions. To characterize a particular expression of political ideas as "propaganda" is to denigrate those ideas." (Findings of Fact and Conclusions of Law, at 16).

b) "There can be little doubt that a film exhibitor, especially in a non-commercial context, is likely and reasonably to be understood as using the film to communicate the exhibitor's own ideas. Thus a statute which inhibits the exhibitor's ability to exhibit also impinges on the exhibitor's ability to communicate." (Findings of Fact and Conclusions of Law, at 9).

6. Plaintiff has exhibited all three films more than once and wishes to continue to exhibit the films in the future, as set forth in his declaration attached as Exhibit "D" to his Summary Judgment Memorandum.

7. California Election Law allows the mailing of campaign literature up until the last day of the campaign. It imposes no requirement that an opponent be given an opportunity to review such literature before mailing, or

that an opponent have an opportunity to respond. (Plaintiff's Exhibit E, Summary Judgment Memo.)

8. There exists a substantial likelihood that plaintiff's law firm and/or its clients will react adversely to plaintiff to the point of severing his relationship with the firm and/or his clients if defendants are allowed to classify the films as foreign "political propaganda". (Declaration of David Freed, Plaintiff's Exhibit, Memorandum in Support of Preliminary Injunction).

9. Plaintiff's Senatorial District includes military bases, at least one of which handles nuclear weapons. (Donald Peterson Declaration, *id*) The district also includes areas suffering from high unemployment in the lumber industry, believed in part to be caused by foreign competition. (Harry Bistrin Declaration, *id*).

10. The term "political propaganda" is commonly understood to be pejorative (Plaintiff's Exhibits B, C, F, and G, Summary Judgment Memo).

11. A public official who exhibits foreign films classified by the federal government as "political propaganda" will be viewed negatively by a substantial portion of the general public, damaging his political career and personal reputation. (Plaintiff's Exhibit A, Summary Judgment Memorandum).

DATED: July 9, 1984.

JOHN G. DONHOFF
Attorney for Plaintiff
Of Counsel
PRIEST, KATZ, FINNEN
& GAFFANEY
Attorneys at Law
1112 "I" Street, Suite 100
Sacramento, California 95814
Telephone (916) 446-0000

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil Action No. S-83-287-RAR

BARRY KEENE, PLAINTIFF

v.

WILLIAM FRENCH SMITH, ET AL., DEFENDANTS

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S STATEMENT OF
MATERIAL FACTS NOT IN DISPUTE**

Defendants, by their undersigned counsel, hereby submit their opposition to plaintiff's Statement of Material Facts Not in Dispute.

2. This fact is immaterial to the issues in this action, inasmuch as the provisions of the Foreign Agents Registration Act, 22 U.S.C. §§ 611, *et seq.*, do not apply to plaintiff. Declaration of Joseph Clarkson, April 25, 1983 ("Clarkson Decl. I"), ¶¶ 4, 5.

5. These statements do not constitute "facts," and are immaterial, inasmuch as the Court's ruling on the Motion for Preliminary Injunction did not adjudicate the merits of the issues in this case. *University of Texas v. Camenisch*, 451 U.S. 390 (1981).

8. This statement does not constitute a "fact," inasmuch as plaintiff has submitted no admissible evidence proving such "facts." Rule 56(e), Federal Rules of Civil Procedure. Moreover, the statement is immaterial, inasmuch as plaintiff is required to prove that there are no genuine issues of material fact, and the existence of a "substantial likelihood" that a fact exists does not meet that standard. *Id*.

10. This statement does not constitute a "fact," inasmuch as plaintiff has submitted no admissible evidence

proving such a "fact." Rule 56(e), Federal Rules of Civil Procedure. Moreover, this statement is immaterial, inasmuch as the connotations given a word by the public are not the requisite legal standard for the issues herein. Plaintiff is required to prove that the statute at issue is unconstitutional on its face. *United States v. Miller*, 367 F.2d 72, 76 (2d Cir. 1966), *cert. denied*, 386 U.S. 911 (1967).

11. This statement does not constitute a "fact," inasmuch as plaintiff has submitted no admissible evidence proving such a "fact." Rule 56(e), Federal Rules of Civil Procedure. Moreover, the statement is immaterial, inasmuch as the connotations given a term by the public do not demonstrate that the statute at issue is unconstitutional. See *United States v. Miller*, *supra*.

Respectfully submitted,

RICHARD K. WILLARD
Acting Assistant
Attorney General

DONALD S. AYER
United States Attorney

/s/ David J. Anderson
DAVID J. ANDERSON

/s/ Surell Brady
SURELL BRADY

/s/ Mona S. Butler
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Telephone: (202) 633-5302

Attorneys for Defendants

July 27, 1984

SUPREME COURT OF THE UNITED STATES

No. 85-1180

EDWIN MEESE, III, ATTORNEY GENERAL OF THE
UNITED STATES AND JOSEPH E. CLARKSON, APPELLANTS

v.

BARRY KEENE

APPEAL from the United States District Court for the
Eastern District of California

The statement of jurisdiction in this case having been
submitted and considered by the Court, probable jurisdiction is noted.

April 21, 1986

APPELLANT'S BRIEF

No. 85-1180

Supreme Court, U.S.

FILED

JUL 7 1986

ROBERT SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

**EDWIN MEESE, III, ATTORNEY GENERAL OF THE
UNITED STATES AND JOSEPH E. CLARKSON,
APPELLANTS**

v.

BARRY KEENE

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

BRIEF FOR THE APPELLANTS

CHARLES FRIED

Solicitor General

RICHARD K. WILLARD

Assistant Attorney General

DONALD B. AYER

Deputy Solicitor General

PAUL J. LARKIN, JR.

Assistant to the Solicitor General

LEONARD SCHAITMAN

HAROLD J. KRENT

Attorneys

Department of Justice

Washington, D.C. 20530

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52580

QUESTIONS PRESENTED

1. Whether appellee, who is not a foreign agent under the Foreign Agents Registration Act of 1938, 22 U.S.C. 611-621, and who is not subject to the requirements or sanctions of the Act, has standing to challenge the constitutionality of the statutory term "political propaganda" on the ground that use of that term is alleged to have chilled his exercise of First Amendment rights.

2. Whether the use of the term "political propaganda" in the Foreign Agents Registration Act of 1938, 22 U.S.C. 611-621, which is expressly defined in the Act in a neutral and valid way, violates the First Amendment because in common usage the word "propaganda" might be understood to have a pejorative meaning.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1180

EDWIN MEESE, III, ATTORNEY GENERAL OF THE
UNITED STATES AND JOSEPH E. CLARKSON,
APPELLANTS

v.

BARRY KEENE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinions of the district court (J.S. App. 1a-31a, 36a-42a) are reported at 619 F. Supp. 1111. An earlier opinion of the district court issuing a preliminary injunction (J.S. App. 44a-65a) is reported at 569 F. Supp. 1513.

JURISDICTION

The judgment of the district court (J.S. App. 32a-34a) was entered on September 13, 1985. A notice of appeal to this Court (J.S. App. 35a) was filed on

October 11, 1985. On October 29, 1985, the district court granted appellants' timely motion to alter or amend the judgment under Fed. R. Civ. P. 59(e), and the district court modified the judgment (J.S. App. 40a). A notice of appeal to this Court from the amended judgment of October 29, 1985 (J.S. App. 43a) was filed on November 12, 1985. On November 27, 1985, Justice Rehnquist extended the time within which to docket the appeal to and including January 9, 1986, and the appeal was docketed on that date. The Court noted probable jurisdiction on April 21, 1986. The jurisdiction of this Court rests on 28 U.S.C. 1252.¹

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the Constitution of the United States provides, in pertinent part:

Congress shall make no law * * * abridging the freedom of speech * * *.

2. The relevant provisions of the Foreign Agents Registration Act of 1938, 22 U.S.C. 611-621, are set forth in an appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

A. Statutory Framework

This case arises under the Foreign Agents Registration Act of 1938 (FARA), ch. 327, 52 Stat. 631-633, 22 U.S.C. 611-621. The purpose of the FARA is to protect the national defense, internal security, and

¹ For the reasons given in the Jurisdictional Statement (at 2 n.1), the appeal was timely as measured from the date of either judgment entered by the district court.

foreign relations of the nation by requiring the agents of foreign principals to identify themselves and their principals and to reveal for public scrutiny their efforts to influence this country's foreign policies. 22 U.S.C. 611 note (congressional statement of purposes); *Viereck v. United States*, 318 U.S. 236, 241 (1943); *id.* at 250-251 (Black & Douglas, JJ., dissenting); see pages 22-28 & notes 19-22, *infra*. To accomplish these goals, the FARA establishes a comprehensive registration, reporting, and disclosure scheme for agents of foreign principals. The scheme is enforced by the Attorney General. He is authorized to bring suit to compel compliance with the Act (22 U.S.C. 618(f); 28 C.F.R. 5.1(a)), and to bring criminal actions for wilful violation of any provision of the Act (22 U.S.C. 618(a)).

An agent of a foreign principal² must file a registration statement³ with the Attorney General and must thereafter periodically provide certain informa-

² An "agent of a foreign principal" includes "any person who acts as an agent, representative, employee, or servant * * * of a foreign principal" and "who directly or through any other person * * * engages within the United States in political activities for or in the interests of such foreign principal" (22 U.S.C. 611(c)(1)(i)). A "'foreign principal'" includes "a government of a foreign country" (22 U.S.C. 611(b)(1)).

³ The registration statement must include, among other things, the agent's name and nationality; a comprehensive statement of the nature of the agent's business; the name of every foreign principal for whom the agent is acting; the terms of the agreement between the agent and the foreign principal; the activities engaged in by the agent, including a detailed statement of any political activities; and the compensation or reimbursement received by the agent and the expenditures made by the agent. 22 U.S.C. 612; see also 28 C.F.R. 5.200, 5.201; Report Form OBD-63.

tion regarding his relationship with a foreign principal, his sources of income, and the nature of his activities. 22 U.S.C. 612. He must further submit to the Attorney General a copy of any "political propaganda for or in the interest of such foreign principal" that the agent sends through the United States mails or by any means of interstate or foreign commerce. 22 U.S.C. 614(a).⁴ The FARA defines the term "political propaganda" to include (22 U.S.C. 611(j)):

* * * any oral, visual, graphic, written, pictorial, or other communication or expression by any person * * * which is reasonably adapted to * * * in any * * * way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country * * * or with reference to the foreign policies of the United States * * *.

The agent must mark any such materials with an identification statement containing information specified in the statute. 22 U.S.C. 614(b); see also 22 U.S.C. 614(c). The words "political propaganda" do not appear in the standard identification statement form used for films (Report Form CRM-159; J.A. 16, 57, 59):

This material is prepared, edited, issued or circulated by (name and address of registrant) which is registered with the Department of Justice, Washington, D.C. under the Foreign Agents

⁴ The FARA also requires the agent to submit to the Attorney General a report setting forth the places, times, and extent of such dissemination. 22 U.S.C. 614(a); see also 22 U.S.C. 616(a).

Registration Act as an agent of (name and address of foreign principal). Dissemination reports on this film are filed with the Department of Justice where the required registration statement is available for public inspection. Registration does not indicate approval of the contents of this material by the United States Government.

The labeling requirement is applicable only to agents of foreign principals under the Act and does not apply to subsequent disseminators or recipients of the materials, such as appellee. In fact, such people are free to remove the identification statement that a foreign agent must affix to the materials (J.S. App. 49a, 54a-55a & n.2).

B. Factual Background

The National Film Board of Canada (Ottawa) produces films in Canada, and as an agency of the government of Canada, is a "foreign principal" under the Act. The National Film Board of Canada (New York office) (NFBC-NY) is the agent of the National Film Board of Canada (Ottawa) in the United States and has registered with the Attorney General pursuant to the FARA since 1947 (J.S. App. 5a).⁵ The NFBC-NY does not routinely include the FARA identification statement in its materials, but rather submits a list of its films to the Department of Jus-

⁵ In its 1983 registration, the Film Board described its activities in part as (J.A. 27):

Promotion and distribution through commercial and non-commercial channels of Canadian Government information, documentary and cultural films, filmstrips, and other visual aid materials to public film libraries, educational institutions, government agencies, etc. * * *

tice for determination which ones are covered by the Act (*id.* at 48a).

In 1982, the NFBC-NY submitted to the Department of Justice a list of 62 films and videotapes that it had distributed during that year. The Department reviewed five of the films and concluded that three of them included "political propaganda" within the meaning of the Act. Two of the films, *Acid from Heaven* and *Acid Rain: Requiem or Recovery*, address the subject of acid rain; the third film, *If You Love This Planet*, concerns nuclear war. J.S. App. 45a, 48a.

C. Proceedings Below

In March 1983, appellee, an attorney and California state legislator, brought this action in the United States District Court for the Eastern District of California, challenging the constitutionality of the term "political propaganda" in the Foreign Agents Registration Act. Appellee alleged that he desired to exhibit the three Canadian films but was "deterred from exhibiting the films by a statutory characterization of the films as 'political propaganda'" and that "if he were to exhibit the films while they bore such characterization, his personal, political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired" (J.S. App. 45a). Appellee sought a preliminary and permanent injunction against application of the FARA to the three films.

1. On September 7, 1983, the district court denied the government's motion to dismiss and granted appellee's motion for a preliminary injunction (J.S. App. 44a-65a). The court held that appellee had standing to challenge the use of the term "political propaganda" in the FARA, and particularly its ap-

plication to the three films which he desired to exhibit (*id.* at 49a-54a). It further held that the complaint stated a claim for relief (*id.* at 55a-56a), indeed, that it raised a "substantial question warranting litigation" (*id.* at 57a). Finding the Act's use of the words "political propaganda" and its labeling requirement to place a very heavy burden of hardship on appellee (*id.* at 63a-64a), the district court entered a preliminary injunction preventing appellants from applying any of the requirements of the Foreign Agents Registration Act to the three films in question pending the disposition of this case (*id.* at 65a). Although the court recognized that appellee lacked standing to challenge the labeling requirement applicable to the NFBC-NY, the court nonetheless concluded that it was impossible to give appellee any effective interim relief without exempting these films from the labeling and reporting requirements of the Act (*id.* at 64a). Accordingly, the court entered an injunction to that effect (*ibid.*).

2. On September 12, 1985, the district court granted summary judgment for appellee on his request for a permanent injunction (J.S. App. 1a-31a). The court adhered to its prior ruling that appellee had standing to challenge the validity of the statutory term "political propaganda" (*id.* at 7a-16a). The court explained that appellee claimed that the statute's use of the derogatory term "propaganda" "puts [him] to the Hobson's choice of foregoing the use of the three Canadian films for the exposition of his own views or suffering an injury to his reputation" (*id.* at 15a). Appellee's claim therefore was that the statutory term amounted to an indirect form of censorship, which was sufficient to provide him with standing (*id.* at 10a).

On the merits, the district court held that Congress's use of the term "political propaganda" violated the First Amendment (J.S. App. 19a-29a). While recognizing that the statute defines "political propaganda" in a "neutral" way carrying "no negative connotation" (*id.* at 20a), the court noted that "the term 'propaganda' as used in ordinary speech is a word of reproach" (*id.* at 19a (citation omitted)), and predicted that "whoever disseminates materials officially found to be 'political propaganda' runs the risk of being held in a negative light by members of the general public" (*id.* at 26a). The court found no "historical or semantic support" for the argument that "the First Amendment was not intended to apply where Congress enacts a statute whose purpose is entirely proper, but which inadvertently burdens speech by the terms in which it is couched" (*id.* at 24a). In any event, the court stated that there was no inadvertence here—that, indeed, "Congress enacted the portion of FARA at issue in order to suppress or restrict that which it found abhorrent," and that it deliberately used "a term of opprobrium" in order "to discourage or suppress speech" (*id.* at 25a).

Finding "no justification" for the use of the phrase "political propaganda" (J.S. App. 28a), the court permanently enjoined enforcement of "any portion of the Foreign Agents Registration Act which incorporates the term 'political propaganda' as a term of art. 22 U.S.C. §§ 611(j) and 614(a)(b) and (c)" (*id.* at 31a). The court also held that these provisions were severable from the remainder of FARA and that its ruling did not adjudicate the validity of any other part of the Act (*id.* at 30a).⁶

⁶ Appellants thereafter moved pursuant to Fed. R. Civ. P. 59(e) to alter the district court's judgment to limit it to only

SUMMARY OF ARGUMENT

I. Plaintiff lacks standing to challenge the constitutionality of the use of the term "political propaganda" in the Foreign Agents Registration Act. Plaintiff's allegation that the use of that term to describe certain foreign political expression interferes with his freedom to exhibit these films simply amounts to a claim that the statute impermissibly "chills" his right to speak. Allegations of a subjective "chill," without more, however, are insufficient to confer standing on appellee. *Laird v. Tatum*, 408 U.S. 1 (1972). Appellee's second alleged injury—injury to his reputation—is also insufficient, because no such injury can fairly be traced to the language of the statute itself. *Allen v. Wright*, 468 U.S. 737 (1984); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976). Because the statute defines the term "political propaganda" in a nonpejorative, content-neutral manner, any stigma to appellee results not from Congress's use of this term, but from the uninformed or misinformed beliefs of members of the public. Public misunderstanding of the meaning of a clearly defined statutory term cannot be attributed to Congress.

II. The district court erred in ruling that the First Amendment is violated by the use of the term "political propaganda" to refer to the materials to be submitted and labeled under the Act. The Act defines

the three films in question. The district court granted the motion and modified its judgment accordingly (J.S. App. 40a). The district court also denied appellants' motion for a stay pending appeal (*id.* at 40a-42a).

that term in a content-neutral manner that does not express official disapproval of the foreign political expression so defined. The legislative history of the FARA shows that Congress did not adopt the Act or that term for the purpose of suppressing speech. The actual administration of the Act shows that this term has been applied in an even-handed manner, demonstrating that the term "political propaganda" is not limited to disfavored speech. If negative inferences accompany the use of the term "propaganda," they stem primarily from the public's reaction to foreign attempts to influence this nation's policies, rather than from the use of that term to describe such efforts. Finally, even if Congress had used this term to express official disapproval of such expression, that expression would not be unconstitutional, because it is ancillary to a legitimate congressional purpose: disclosure of the identity of foreign agents in order to allow the public to appraise their expression in light of their identities and allegiances to foreign principals.

ARGUMENT

I. APPELLEE LACKS STANDING TO CHALLENGE CONGRESS'S USE OF THE TERM "POLITICAL PROPAGANDA" IN THE FOREIGN AGENTS REGISTRATION ACT OF 1938

It is well settled that Article III requires the party who invokes the authority of a federal court to "show that he personally has suffered some actual or threatened injury" (*Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472, (1982) (citation omitted)). This injury must be "'distinct and palpable'" rather than "'abstract' or 'conjectural' or 'hypothetical'" (*Allen v. Wright*, 468 U.S. 737, 751 (1984)

(citations omitted)). Moreover, the requisite injury-in-fact must be caused by "the challenged action of the defendant," rather than "the independent action of some third party not before the court" (*Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); *Allen*, 468 U.S. at 751, 757-761). And, of course, the plaintiff bears the burden of establishing his standing (*Warth v. Seldin*, 422 U.S. 490, 501-502, 517-518 (1975)). The power to seek judicial review "is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests'" (*Diamond v. Charles*, No. 84-1379 (Apr. 30, 1986), slip op. 7).

Appellee has precisely that status under the FARA. Appellee is not an "agent of a foreign principal" under the Act and is not subject to any of the requirements or sanctions the Act prescribes. The identification statement that a registered, foreign agent must use to label a film does not use the phrase "political propaganda," and, in any event, appellee is free to remove any such label when he exhibits these films (J.S. App. 54a-55a).

Nonetheless, appellee claims that the statutory term "political propaganda" has injured him in two ways. First, he claims that it prevents him from exhibiting these films "without interference" so long as they are classified as "political propaganda" under the Act (J.A. 49 (Amended Complaint para. 13)). Second, he alleges that his "personal and professional reputations" will be damaged by exhibiting a film classified as "political propaganda," because he "would be falsely, maliciously, and unlawfully identified as the disseminator of distorted or untrue information on behalf of a foreign power" (J.A. 49, 50 (Amended Complaint paras. 11, 14)). Neither allegation is suf-

ficient to establish standing to challenge the constitutionality of the statutory use of this term.

A. Appellee's Allegation Of A Chilling Effect Does Not Suffice To Confer Standing

Appellee's first allegation of injury is that he is being prevented from showing the films by the chilling effect of the term "political propaganda." Such an allegation is plainly insufficient to confer standing under this Court's decision in *Laird v. Tatum*, 408 U.S. 1 (1972). There, the plaintiffs challenged an Army intelligence gathering program on the ground that it chilled their First Amendment right of speech and assembly, but the Court held that they lacked standing to sue (408 U.S. at 10-16). As the Court explained, a plaintiff "who alleges that the exercise of his First Amendment rights is being chilled" by the existence of governmental program does not "without more" have standing to challenge the constitutionality of that program (*id.* at 10). The Court noted that "in each of the[] cases [in which it had considered a "chilling effect" argument], the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging" (*id.* at 11). Thus, while the Court recognized that "governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights" (*id.* at 12-13), the Court held that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm" (*id.* at 13). See also *United Public Workers v.*

Mitchell, 330 U.S. 75, 86-91 (1947); *United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1378-1380 (D.C. Cir. 1984).⁷

The applicability of *Laird* is in no way altered by the district court's conclusion that appellee "is not * * * complaining of a 'chilling effect' on the exercise of his First Amendment rights; he is complaining of a species of censorship" (J.S. App. 10a). No actual or threatened censorship is remotely involved in this case. The government has not restrained appellee from exhibiting these films; he has not been subjected to or threatened with any type of sanction or penalty for doing so; and he did not need the prior approval of a governmental licensing board to exhibit them.

Moreover, the fact that appellee may voluntarily elect to forego use of the films rather than have his name linked to "political propaganda" does not by itself satisfy standing. Without concrete proof of in-

⁷ As the court explained in *United Presbyterian Church v. Reagan*, 738 F.2d at 1378-1379 (emphasis in original):

"[C]hilling effect" * * * is foreclosed as a basis for standing by the Supreme Court's holding in *Laird v. Tatum* * * *. All of the Supreme Court cases employing the concept of "chilling effect" involve situations in which the plaintiff has unquestionably suffered some concrete harm (past or immediately threatened) apart from the "chill" itself. * * * "Chilling effect" is cited as the reason why the governmental imposition is invalid rather than as the harm which entitles the plaintiff to challenge it. * * * [T]he standing question * * * [is] whether the fear [of a "chilling effect"] constitutes cognizable harm. On th[is] latter point, *Tatum* is clear and categorical: "[a]llegations of a subjective 'chill' are not . . . adequate."

See also 738 F.2d at 1379 n.1 (quoting G. Gunther, *Cases and Materials on Constitutional Law* 1186-1187 (10th ed. 1980)).

dependent and objective consequences flowing from the government's action, a party's personal choice to relinquish the right to speech is not cognizable injury under *Laird v. Tatum*, *supra*. Standing is not conferred upon those who merely "feel inhibited" (*Younger v. Harris*, 401 U.S. 37, 42 (1971)). Absent a direct threat of a sanction, such as a criminal penalty, standing can only be predicated on a showing of imminent, actual harm. *United Public Workers v. Mitchell*, 330 U.S. at 89-90.

B. Appellee's Allegation Of Injury To His Reputation Does Not Confer Standing Because It Is Too Indirect And Is Not Fairly Traceable To The Wrong Alleged

Appellee's second alleged harm—injury to his reputation⁸—is of a type which, in some instances, may serve as a basis for standing. See *Allen v. Wright*, 468 U.S. at 754-755. In this case, however, appellee's asserted injury to his reputation can result only by a series of occurrences, some of which are unlikely and most of which are not of the government's doing. Accordingly, the claim of causation alleged by appellee is so indirect and uncertain that it cannot be said that the asserted injury will in fact result, or, if it does, that it is the consequence of the statutory label,

⁸ Insofar as appellee alleges harm to his chances for reelection (see Mot. to Aff. 4-5), he raises a type of injury that is significantly more attenuated than an impaired reputation. The district court did not rely on this argument, and we submit that the injury appellee asserts is even more indirect and speculative than his general allegation that his reputation has been impaired. For that reason, it does not suffice to confer standing. See *Winpisinger v. Watson*, 628 F.2d 133, 139 (D.C. Cir.), cert. denied, 446 U.S. 929 (1980).

rather than of the independent actions of third parties. *Id.* at 751, 757-761; *Eastern Kentucky*, 426 U.S. at 38, 41.

The FARA (1) defines "political propaganda" in a way recognized by the district court to carry "no negative connotation" (J.S. App. 20a), (2) requires that a label not using this term, and not at issue in this case, be affixed to material fitting that neutral definition, and (3) leaves persons such as appellee completely free to remove or conceal the label. In order for appellee to be injured by the statute's use of that term, then, the members of the public must first become aware that the material has been found appropriate for labeling under the Act, either by appellee's decision to display the label or by some other means. They must also become aware that the statutory term used to refer to such material is "political propaganda," which is not apparent from the label affixed to the film. Finally, they must remain ignorant of the neutral manner in which the statute defines that term, and must independently attach a significant negative value judgment, first, to the film itself and, second, to the person exhibiting it. Given the indirect and convoluted character of this necessary chain of events, both the fact of injury⁹ and its

⁹ See J.A. 110 (Declaration of Barry Keene as Regards Having Exhibited the Three Films) ("After obtaining a preliminary injunction, * * * I arranged to exhibit the films. The films were exhibited in an auditorium in the basement of the West Wing of the State Capitol Building, Sacramento, California, beginning at noon on July 6, 1983, to a standing room only audience of the general public and legislative staff."); see also *Canadian Films and the Foreign Agents Registration Act: Oversight Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 40-41 (1983) (Rep. Conyers)

causation by the government's choice of words are highly speculative. Such "unadorned speculation will not suffice to invoke the federal judicial power" (*Diamond v. Charles*, slip op. 11 (quoting *Eastern Kentucky*, 426 U.S. at 44)).¹⁰

In *Eastern Kentucky*, the Court held that plaintiffs lacked standing to challenge the decision to grant a federal tax exemption to a hospital not providing more than emergency room care to indigents, ruling that it was purely speculative whether the hospitals' treatment policies would be altered if their tax exemptions were revoked (426 U.S. at 42-43). The causal connection between the injury suffered by the plaintiffs—the hospitals' denial of nonemergency medical treatment—and the relief they requested—revoca-

("[t]here is a sort of comic element about the whole thing in that by labeling something the Government doesn't necessarily approve of you attract attention to it * * * and citizens' appetites are whetted enormously to see what it is that got the label * * *. Certainly in this instance there has been a totally warming effect on the films that have been involved.").

¹⁰ This case differs materially from *Block v. Meese*, No. 84-5318 (D.C. Cir. June 18, 1986), cert. denied, No. 85-1837 (July 7, 1986), where a plaintiff engaged in the commercial distribution of foreign films on a substantial scale was found to have standing to challenge the FARA. The court there noted plaintiff's allegation that his sales would be significantly reduced as a result of the classification of the films and of the publication of the names of organizations and theatres exhibiting them, and cited to affidavits of organizations declining to purchase the films for precisely these reasons. Slip op. 6-7. In this case neither appellee nor the persons to whom plaintiff proposed to exhibit the films would have their names disclosed or reported in any way. Insofar as *Block* contains dicta suggesting that mere public misunderstanding of the term "propaganda" would suffice to give standing (slip op. 8), we respectfully disagree.

tion of the hospitals' tax exempt status—was sufficiently uncertain to break the chain of causation necessary to establish standing (*id.* at 40-46).

Similarly, in *Allen v. Wright*, *supra*, the Court held that the chain of causation between the IRS's decision to grant federal tax exemptions to allegedly discriminatory private schools and the effect that the IRS's decision would have on the ability of children to obtain an education in a racially integrated school was also too attenuated to provide standing. 468 U.S. at 757-761. The Court found that that claim of injury was too dependent on the collective action of third parties, the parents of the children attending the private schools, whose decisions where to send their children might have a significant impact on the ability of public school students to receive an integrated education, to conclude that there was a sufficient causal connection between the IRS's decision and the plaintiff's alleged injury. *Id.* at 758-759.

In this case, if appellee has suffered any injury from the statute's use of the term "political propaganda," that injury plainly flows from the subjective impressions of third parties, and not the government's classification of the films. Here Congress defined its terminology precisely. The uninformed or misinformed reaction of the public cannot be attributable to Congress. Congress on occasion may use terms whose ambiguity or shading gives rise to a somewhat different meaning than the one intended. All that can be expected, however, is a reasonably lucid articulation of the legislative policy. Otherwise, a statute would be hostage to the public's perception of the legislative scheme, and a determination of constitutional-

ity would hinge on the particular nuances in vogue at any given time.¹¹

II. CONGRESS'S USE OF THE TERM "POLITICAL PROPAGANDA" IN THE FOREIGN AGENTS REGISTRATION ACT OF 1938 CREATES NO BURDEN ON FREE EXPRESSION COGNIZABLE UNDER THE FIRST AMENDMENT

In holding that Congress's use of the term "political propaganda" in the FARA unconstitutionally abridged appellee's First Amendment rights, the district court endorsed what it rightly termed a "novel" conclusion (J.S. App. 16a). The district court did not find that the FARA, or its use of the term "political propaganda," directly restricts appellee's freedom of speech in any way. Notably absent from this case are any restrictions on the acquisition or exhibition by appel-

¹¹ Assuming an injury to appellee's reputation caused in some sense by the statute's classification and labeling scheme, alleviation of that injury is not "likely" to follow from a favorable decision" invalidating use of the term "propaganda" (*Allen*, 468 U.S. at 751; *Eastern Kentucky*, 426 U.S. at 38, 41). Appellee's requested relief—that the term "advocacy" be substituted in its stead (Mot. to Aff. 9-10), leaving the functioning of the statute otherwise unchanged—would accomplish little or nothing. Anyone aware of the reason for the substitution is likely to treat the term "advocacy" simply as a euphemism for the existing term "propaganda." And anyone aware of the statutory objective—to allow public appraisal of foreign source material in light of the identity of its source—is likely nonetheless to approach the material with a sense of skepticism. One can imagine the government being required to substitute one term after another, chasing an unattainable goal, despite the fact that each successive statutory term carries only the message that the material's source and purpose recommends it for careful and perhaps skeptical consideration.

lee of the films in dispute,¹² any conditioning of his receipt or exhibition of the films on an official act of some type,¹³ such as advance registration,¹⁴ or any suppression of his exhibition of the films by threat or intimidation.¹⁵

Rather, the district court held that, by requiring exhibitors of films defined by the FARA as "political propaganda" to have, in the court's words, "the courage to use materials officially censured by the government," the statutory definition of "political propaganda," without more, "constitutes a burden on speech by making such materials unavailable to all but the most courageous" (J.S. App. 26a-27a). The district court also found that Congress "understood and intended" this phrase "as a term of opprobrium" in order "to discourage or suppress speech" (*id.* at 25a). Contrary to the district court's belief, however, neither the meaning of the term "political propaganda," nor the effect of the statute as applied, suggests that it amounts to official disapproval or denigration of the material so classified. It simply reflects the congressional judgment that, in view of the wide range of motives that may inspire such material, it is best viewed and evaluated with an awareness as to its source. Moreover, even if this judgment by Congress, or negative connotations of the terminology it chose, is viewed as constituting an

¹² See *City of Renton v. Playtime Theatres, Inc.*, No. 84-1360 (Feb. 25, 1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Erznozick v. City of Jacksonville*, 422 U.S. 205 (1975).

¹³ See *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

¹⁴ See *Thomas v. Collins*, 323 U.S. 516 (1945).

¹⁵ See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

official disapproval of each item of material so classified, it is a judgment which Congress could properly make without offense to the First Amendment, in the execution of its constitutional powers.

A. The Term "Political Propaganda" Is Defined In The FARA In A Content-Neutral Manner That Does Not Constitute Official Disapproval of Political Expression

1. The district court's premise—that the term "political propaganda" serves as a badge of official disapproval (J.S. App. 25a)—finds no support in the text of the statute. The statutory definition includes "any * * * communication * * * reasonably adapted to * * * influence a recipient * * * with reference to the political or public interests, policies, or relations" of a foreign government or foreign political party, or the foreign policies of this nation. 22 U.S.C. 611(j). It describes in nonjudgmental terms a certain category of communications. That the Act proceeds to impose certain labeling and disclosure requirements on these communications, while not restricting their dissemination in any way, does not indicate a judgment of any kind on the merit of each particular item so classified. It merely reflects Congress's conclusion that public consideration of the material will be enhanced by awareness of its source.

This neutral use of the term "propaganda" is consistent with general usage and understanding. *Webster's Third New International Dictionary* 1817 (1981) defines "propaganda" in one definition as "doctrines, ideas, argument, facts, or allegations spread by deliberate effort through any medium of communication in order to further one's cause or to

damage an opposing cause."¹⁶ Further, Congress has used "propaganda" in a nonpejorative manner in other statutes,¹⁷ and this Court has used this term in that manner as well.¹⁸

¹⁶ The fact that the term is also sometimes used to carry a disparaging meaning, see, e.g., *Webster's New World Dictionary* 1138 (2d ed. 1972) (definition No. 3: "now often used disparagingly to connote deception or distortion"), does not suggest that it must be or is always so used.

¹⁷ Section 501(c) (3) of the Internal Revenue Code (26 U.S.C.) (emphasis added) exempts organizations which carry on substantial political activity from the charitable deduction:

Corporations, and any community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes * * * no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation * * *.

In addition, Congress has delimited the powers of United Service Organizations so that "[n]o substantial part of the activities of the corporation shall involve carrying on propaganda, or otherwise attempting to influence legislation" (36 U.S.C. 1304(a)). See also 5 U.S.C. 4107.

¹⁸ For instance, in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974), this Court explained that if political advertisements were not banned on public rapid transit vehicles, "[u]sers would be subjected to the blare of political propaganda." In *National Association of Letter Carriers v. Austin*, 418 U.S. 264, 280 n.14 (1974), the Court, in discussing a union's organizational activities, stated that "[i]t seems likely that the Executive Order was similarly not intended to limit union propaganda or prohibit any other method of peaceful persuasion." The Court characterized union informational activities in a similar manner in *NLRB v. Drivers Local 639*, 362 U.S. 274, 279 (1960), recognizing the "right in unions to 'use all lawful propaganda to enlarge their membership.'"

In determining whether the statutory definition of "political propaganda" constitutes official disapproval of expression, the text of the statute is controlling. It is well settled that "[s]tatutory definitions control the meaning of statutory words" (*Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949)), and that it is "both within the right and the wisdom of Congress not to trust to the colloquial or the dictionary meaning of * * * [a word], but to write its own" (*62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951)). Where, as here, Congress has defined a particular statutory term, that definition excludes "colloquial meanings" (*Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490, 502 (1945)).

More generally, the text of the FARA emphatically identifies the objectives of the Act in a way that does not prejudice any particular item of "political propaganda." The text of the FARA makes clear that it simply seeks "public disclosure by persons engaging in propaganda activities and other activities for or on behalf of * * * foreign principals," so that both the public and the government can "appraise [foreign agents'] statements and actions in light of their associations and activities" (22 U.S.C. 611 note). The text of a statute provides the surest guide to Congress's intent (see *Board of Governors v. Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 12), and various sections of a statute should be read as a whole (see *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975)). This statement of purpose, coupled with the broad and non-pejorative statutory definition of "political propaganda," clearly shows that Congress made no a priori value judgment—beyond that of the appropriateness of disclosure—regarding communications so defined.

2. The legislative history of the FARA also supports that conclusion. While stimulated by concerns about Nazi propaganda, after substantial consideration Congress made the decision to cover the propaganda activities of all foreign agents.¹⁹ When the

¹⁹ The Act traces its lineage to a resolution passed by the House of Representatives on March 20, 1934, authorizing a special committee to investigate the extent of Nazi propaganda and similar forms of subversive foreign influence in the United States. H.R. Res. 198, 73d Cong., 2d Sess., 78 Cong. Rec. 11069. The McCormack Committee, as it was known, recommended that Congress adopt legislation requiring foreign agents to register with the federal government. H.R. Rep. 153, 74th Cong., 1st Sess. 23 (1935). While the McCormack Committee was particularly concerned with the spread of Nazi, Fascist, and Communist propaganda (see *id.* at 3-23), the Committee advised Congress to require "all publicity, propaganda, or public-relations agents or other agents or agencies, who represent in this country any foreign government or a foreign political party or foreign industrial or commercial organization" to register with the federal government (*ibid.*). As the committee's report stated (*id.* at 23 (emphasis added)):

Congress should enact a statute requiring *all* publicity, propaganda, or public-relations agents or other agents or agencies, who represent in this country any foreign government or a foreign political party or foreign industrial or commercial organization, to register with the Secretary of State of the United States, and to state the name and location of such foreign employer, the character of the service to be rendered, and the amount of compensation paid or to be paid therefor.

Congress endorsed the McCormack Committee's recommendations that foreign agents should be required to register with the government and that the registration requirement should be broadly defined to include such agents of every stripe. While Congress was concerned that "there are many persons in the United States representing foreign governments or

term "political propaganda" and the labeling and submission requirements were added in 1942, Congress made plain that it did not intend to restrict the

foreign political groups, who are supplied by such foreign agencies with funds to foster unAmerican activities, and to influence the external and internal policies of this country" (H.R. Rep. 1381, 75th Cong., 1st Sess. 1-2 (1937); S. Rep. 1783, 75th Cong., 3d Sess. 2 (1938)), the Act was not limited to only those persons espousing allegedly subversive ideas and programs. The statutory definition of "agent of a foreign principal," which was taken virtually verbatim from the McCormack Committee's report, covered "any person who acts * * * as a public-relations counsel, publicity agent, or as agent, servant, representative, or attorney for a foreign principal" as well as "any person who receives compensation from or is under the direction of a foreign principal" (22 U.S.C. (1940 ed.) 611(d)).

"The purpose" of the Act, Congress explained, was "to make available to the American public the sources that promote and pay for the spreading of such foreign propaganda," which is "usually conducted in secrecy" (H.R. Rep. 1381, *supra*, at 2; S. Rep. 1783, *supra*, at 2). By applying the principles underlying the labeling requirements of the federal food and drug laws to "a different field, that of political propaganda," the Act would force foreign agents "to come out 'in the open,' " without prohibiting "[s]uch propaganda" in any way (H.R. Rep. 1381, *supra*, at 2; S. Rep. 1783, *supra*, at 2). As the committee reports explained, Congress decided to "require all persons who are in the United States for political propaganda purposes"—not only for the purpose of "establishing in the United States a foreign system of government," but also for any other "purpose of a political propaganda nature"—to register with the government. H.R. Rep. 1381, *supra*, at 2; S. Rep. 1783, *supra*, at 2. In that way, by shining "the spotlight of pitiless publicity" on foreign agents and their principals (H.R. Rep. 1381, *supra*, at 2; S. Rep. 1783, *supra*, at 2), Congress sought to ensure that "our people * * * [would] know the sources" of the information and attempts at persuasion that they were receiving (H.R. Rep. 1381, *supra*, at 2; S. Rep. 1783, *supra*, at 2).

speech of foreign agents,²⁰ or to single out only information from hostile nations. In fact, the neutral scope of the 1942 amendments was nearly their un-

²⁰ Act of Apr. 29, 1942, ch. 263, 56 Stat. 248 *et seq.* During Congress's consideration of the 1942 amendments, the Department of Justice successfully opposed the addition of a requirement that foreign agents submit political propaganda to the Department before it was transmitted by a foreign agent, on the ground that the requirement might constitute a forbidden prior restraint. See *Amending Act Requiring Registration of Foreign Agents: Hearings on H.R. 6045 Before Subcomm. No. 4 of the House Comm. on the Judiciary, 77th Cong., 1st Sess. 42 (1941)* (L.M.C. Smith, Chief Special Defense Unit, Dep't of Justice) [hereinafter cited as *House Hearings*].

The House report stressed that "[i]t cannot be emphasized too strongly that these amendments do not change the fundamental approach of the statute, which is one not of suppression or of censorship, but of publicity and disclosure" (H.R. Rep. 1547, 77th Cong., 1st Sess. 2 (1941)), and that purpose was repeatedly emphasized during the debate on the amendments. See S. Rep. 913, 77th Cong., 1st Sess. 2 (1941); 87 Cong. Rec. 10022 (1941) (Sen. Kilgore); *id.* at 10050 (Rep. Fish) (bill "applies to all nations, the British, the French, Norwegian [*sic*], and all the rest who have propaganda agents in this country"); *id.* at 10050, 10052 (Rep. McLaughlin); *ibid.* (Rep. Michener); *id.* at 10063 (Rep. McLaughlin); see also *House Hearings* 14, 16, 17, 18, 19-20, 25, 26 (L.M.C. Smith); *id.* at 34 (Vincent M. Miles, Solicitor, Post Office Dep't); *id.* at 42, 49-51 (L.M.C. Smith); *id.* at 52-53 (Rep. Voorhis).

The statutory definition of "political propaganda" was also entirely neutral, covering "all communications issued by foreign agents, 'whether friendly or unfriendly, whether violent or mild'" (*Block v. Meese*, slip op. 10, quoting *United States v. Kelly*, 51 F. Supp. 362, 363 (D.D.C. 1943)). Discussing that definition, the Senate report explained that it was "comprehensively defined" to ensure that "all political propaganda disseminated by agents of foreign principals" would be subject to the disclosure requirements of the Act (S. Rep. 913, 77th Cong., 1st Sess. 9 (1941)). The definition of "political propaganda" was intended to be "a broad one" (*ibid.*; see H.R. Rep.

doing. President Roosevelt initially vetoed the amendments, on the ground that they could interfere with the joint activities of the United States and its wartime allies.²¹ Congress responded to his concerns by authorizing him to create an exemption for agents of those nations whose interests he deemed vital to the national defense.²²

1547, *supra*, at 3), since Congress considered it "desirable that any material which [a foreign agent] disseminate[d] that may be classed as political propaganda be properly labeled and copies filed" (S. Rep. 913, *supra*, at 9). The labeling and filing requirements were added so that "[w]ith all this information at their disposal, recipients of such propaganda can properly appraise its worth" (H.R. Rep. 1547, *supra*, at 4; see S. Rep. 913, *supra*, at 9).

²¹ Veto Message from the President of the United States (H.R. Doc. 611, 77th Cong., 2d Sess. 2 (1942)).

²² See 22 U.S.C. 613(f); H.R. Rep. 2038, 77th Cong., 2d Sess. 2 (1942); S. Rep. 1227, 77th Cong., 2d Sess. 2 (1942); 88 Cong. Rec. 3178 (1942) (Sen. Danaher); *Block v. Meese*, slip op. 10.

In fact, during World War II, agents of the British Government, agents of the London Fire Brigade, and agents of the Spanish Ambassador, to list but a few, registered under the Act. *Report of the Attorney General to the Congress of the United States on the Administration of the Foreign Agents Registration Act of 1938* (1945). The Attorney General also noted in his report that "the great bulk of propaganda in this period is that which, distributed by agents of foreign governments, has centered on building up reservoirs of good will and friendship. The contributions our Allies have made to the common war effort, their resistance to the Axis, conditions under Axis occupation, and similar war topics have formed a principal part of such propaganda, although the history and culture of a foreign country, its political, economic, and social problems, are frequently, and in some instances mainly, stressed" (*id.* at 32).

The 1966 amendments to the Act also demonstrate that Congress still regarded the purpose of the Act as requiring

3. The administration of the Act by the Department of Justice reveals that the term "political propaganda" has not been applied to suggest official disapproval of any particular foreign political expression. Even in time of war, the FARA was consistently applied to friend and foe alike. See *Report of the Attorney General to the Congress of the United States on the Administration of the Foreign Agents Registration Act of 1938*, at 100-101 (1945). The record in this case also shows that the term "political propaganda" is not used to smear a film as "un-American, twisted, and pernicious" (J.S. App. 25a). That term has been found applicable to films disseminated by close friends and allies, such as Canada, which is responsible for transmitting the three films

foreign agents to disclose their identities and allegiances to inform the public of their motives for engaging in advocacy, regardless of the particular message they conveyed. See S. Rep. 875, 88th Cong., 2d Sess. 5 (1964) ("[t]he 'pitiless spotlight of publicity,' which Congressman Emanuel Celler so aptly referred to as the purpose of this legislation 25 years ago remains its purpose today"); *id.* at 9, 11-12; 110 Cong. Rec. 16033, 16035 (1964) (Sen. Fulbright); S. Rep. 875, 88th Cong., 2d Sess. 2 (1964); S. Rep. 143, 89th Cong., 1st Sess. 5, 9, 11-12 (1965); 111 Cong. Rec. 6985 (1965) (Sen. Fulbright); H.R. Rep. 1470, 89th Cong., 2d Sess. 2 (1966) ("[t]he act is intended to protect the interests of the United States by requiring complete disclosure by persons acting for or in the interests of foreign principals where their activities are political in nature or border on the political. Such political disclosures as required by the act will permit the Government and the people of the United States to be informed as to the identities and activities of such persons and so be better able to appraise them and the purposes for which they act"); 112 Cong. Rec. 10536 (1966) (Rep. Tuck); *ibid.* (Rep. Poff); *id.* at 10537 (Rep. McCulloch); *ibid.* (Rep. Celler); *id.* at 10538 (Rep. Dorn); *id.* at 13827-13828 (Sen. Fulbright).

at issue here, and to materials that reflect policy positions taken by this nation (see *Block v. Meese*, slip op. 14), such as *Plight of the Soviet Jewry: Let My People Go*, a film distributed on behalf of the Consulate General of Israel, *The Wall of Terror*, a film distributed on behalf of the German Consulate General, and *Trade—Who Needs It?*, a film distributed on behalf of the Government of Japan. J.A. 60, 61, 63. The day-to-day operation of the Act therefore reinforce its literal meaning. See *Block v. Meese*, slip op. 14; cf. *FDIC v. Philadelphia Gear Corp.*, No. 84-1972 (May 27, 1986), slip op. 12-13.

4. Notwithstanding the clarity of the neutral definition of "political propaganda" in the FARA, as well as its even-handed application, the district court invalidated the use of this term in part because Congress "understood and intended [this phrase] as a term of opprobrium, * * * by which it intended to discourage or suppress speech" (J.S. App. 25a). For two reasons, this conclusion of a devious motive on the part of Congress does not support the court's ruling.

First, it is well settled that a statute may not be invalidated under the First Amendment on the ground that the legislation, while proper on its face, was motivated by hostility towards freedom of speech when the legislature adopted the act. As the Court explained in *United States v. O'Brien*, 391 U.S. 367, 383-384 (1968), and reiterated last Term in *City of Renton v. Playtime Theatres, Inc.*, No. 84-1360 (Feb. 25, 1986), slip op. 5-6, "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative purpose" (*O'Brien*, 391 U.S.

at 383; *City of Renton*, slip op. 5-6).²³ The district court's inquiry into legislative motive is therefore irrelevant, because a statute may not be invalidated "on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it" (391 U.S. at 383).

Second, Congress did not, in fact, adopt this language in order to "suppress or restrict that which it found abhorrent" (J.S. App. 25a). The district court's ascription of such a purpose is belied not only by the statutory definition and the legislative history,

²³ In *O'Brien*, the defendant challenged the constitutionality of a federal statute making it a crime to destroy a Selective Service System registration card, on the ground that the statute was motivated by congressional hostility towards the destruction of draft cards as a means of voicing disapproval of the nation's participation in the Vietnam war. In upholding the statute, the Court made clear that the presence of substantial and legitimate purposes for the act, not the absence of illegitimate ones, was sufficient to sustain the constitutionality of the statute. *O'Brien* also expressly refused to undertake the inquiry into legislative motive that the district court followed in this case. 391 U.S. at 383-384.

In *City of Renton*, the court of appeals had struck down a municipal ordinance restricting the location of adult movie theatres, ruling that the ordinance was invalid if "a motivating factor," however slight, in the municipality's decision to adopt the ordinance was the intent to restrict the theatre owners' exercise of their First Amendment rights. Slip op. 5-6 (citation omitted). Relying on *O'Brien*, this Court reversed the court of appeals, stating that "[t]his view of the law was rejected in * * * *O'Brien*" (*City of Renton*, slip op. 6), and that "[t]he district court's finding as to 'predominant' intent" was "more than adequate" to sustain the ordinance (*ibid.*).

but also by the fact that any negative connotations of the phrase derive primarily from the public's reaction to the source and purpose of the material it describes. To whatever extent the term "propaganda" induces a reaction of suspicion and caution, it is mainly due not to the word but to the phenomenon it describes: public expression designed to further one's cause. Where, as here, the cause is related to the interests of foreign nation, it is hardly surprising that it may be viewed skeptically. As Judge Scalia recently stated in a similar case (*Block v. Meese*, slip op. 13 (citations and footnote omitted; emphasis in original)):

It seems to us not quite true that, as asserted in a district court opinion involving the same provision at issue here (with whose holding we disagree) "[p]olitical propaganda" is ordinarily and commonly understood to mean material that contains half-truths, distortions, and omissions." * * * It is understood to mean precisely the type of political speech the dictionary definitions quoted above describe (and which no other English word accurately describes)—which type of speech is, in turn, generally regarded as more likely than other speech to contain "half-truths, distortions, and omissions."

For precisely this reason, it is illogical to suppose, as appellee does (see Mot. to Aff. 10), that the objection is really to the use of the word "propaganda." Once the character of the material as defined in the statute is understood, whatever term is used will engender the same public reaction.

B. Because The Statute As Written And Applied Carries No Official Disapproval Of Political Expression, The Act May Not Be Invalidated On The Basis Of The Connotations That Its Words May Be Given

The Constitution simply does not, as the district court believed, require Congress to devise "the best solution to a knotty problem to draftsmanship" or "demand that those whose business is communication communicate with their audience in terms of their audience's linguistic conventions" (J.S. App. 29a). Inherent difficulties in draftsmanship can often preclude Congress from enacting a provision completely free from unintended or extraneous potential connotations. This is particularly true where the connotations that a term may have depend on the context in which it is used. See *Block v. Meese*, slip op. 13-14 n.3 ("[u]ndoubtedly, one would not describe the ideological efforts of one's own church or nation as 'propagandizing,' though they are such—just as one would prefer to describe one's brother-in-law as a merchant rather than a used-car-salesman"). It is enough that the terms be reasonably clear so that an ordinary person exercising common sense can sufficiently understand the statutory scheme.²⁴ Cf. *Cole v. Richardson*, 397 U.S. 238, 240 (1970) (Harlan, J., concurring) ("almost any word or phrase may be rendered vague and ambiguous by dissection with a semantic scalpel," but "[t]his kind of semantic in-

²⁴ Although the district court is correct (J.S. App. 24a) that the First Amendment may be violated even if the legislature did not have an invidious intent in drafting a statute (see, e.g., *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983)), here the alleged injury arises not from the statute as written, but from the subjective perception of third parties who may misunderstand the statutory scheme.

quiry" "amounts to little more than verbal calisthenics").

Even where constitutionally protected activities are involved, it is not the role of the judiciary to second-guess Congress's decision on issues that are inherently matters of judgment and discretion.²⁵ In *Buckley v. Valeo*, 424 U.S. 1, 82-84 (1976), for instance, this Court sustained the \$10 and \$100 thresholds for the recordkeeping and reporting requirements of the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.* The Court recognized that the threshold levels "are indeed low" and "may well discourage participation by some citizens in the political process" (424 U.S. at 83). It nonetheless rejected a constitutional challenge to the levels Congress set even though Congress may not have been able to assert a compelling justification for those particular levels, explaining (*ibid.*) "we cannot require Congress to establish that it has chosen the highest reasonable threshold. The

²⁵ If Congress had supplied no definition of the term "political propaganda," a federal court confronting a First Amendment challenge to the statute would "have a duty" (*United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, 130 n.7 (1973)) to follow the "cardinal principle" (*Crowell v. Benson*, 285 U.S. 22, 62 (1932)) of construing the statute, if fairly possible, to avoid the constitutional defect. See also *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982). "The judicial function is 'not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations'" (*Selective Service System v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 850 (1984) (citation omitted)). Accordingly, a court with the undefined term "political propaganda" would seek to interpret the statute in a neutral way that both accorded with Congress's intent and would be constitutionally permissible. Surely, the FARA is open to no greater challenge because Congress itself has supplied such a neutral definition in the statute.

line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion."

So, too, Congress cannot be expected to use the most precise language or language that will not have a negative meaning for some members of the public,²⁶ and it certainly need not articulate a compelling interest for the use of every word in a statute. Otherwise, the judiciary would become a "panel of grammarians" (*Flora v. United States*, 362 U.S. 145, 150 (1960)), and a determination of constitutionality could well turn on the changing nuances or shadings of the language used in a statute.

²⁶ The statute here is quite similar to the one reviewed by the Court in *United States v. Harriss*, 347 U.S. 612 (1954), which involved a challenge to the reporting and disclosure requirements of the Federal Regulation of Lobbying Act, 2 U.S.C. 261-270. There, the Court construed several provisions of the Act in a manner clarifying its registration and reporting requirements. It then rejected a First Amendment challenge to these requirements (347 U.S. at 625-626):

Under these circumstances, we believe that Congress, at least within the bounds of the Act as we have construed it, is not constitutionally forbidden to require the disclosure of lobbying activities. To do so would be to deny Congress in large measure the power of self-protection.

"Lobbying," like "propaganda," carries negative connotations at least in the minds of some. See *United States v. Finance Committee to Re-elect the President*, 507 F.2d 1194, 1201 (D.C. Cir. 1974) ("[l]obbying is of course a pejorative term, but another name for it is petitioning for the redress of grievances"). If those connotations posed no problem in upholding the statute in *Harriss* against a First Amendment challenge, a similar conclusion would seem to follow here.

C. Even If The Statute's Use Of The Term "Political Propaganda" Did Embody Official Disapproval Of The Speech To Which It Applies, It Would Not Offend The First Amendment

Even if the Act's use of the term "political propaganda" does in fact express official disapproval and denigration of the expression to which it applies, it is nonetheless constitutionally valid as a reasonable exercise of Congress's legislative power, which places only the most attenuated burden on free expression. The district court in this case acknowledged (J.S. App. 25a) the validity of the statute's basic purpose—"to protect the national defense, internal security, and foreign relations of the United States by requiring [certain] public disclosure[s by foreign agents] * * * so that the Government and the people of the United States * * * may appraise their statements and actions in the light of their associations and activities" (22 U.S.C. 611 note). Every court that has addressed the question has upheld the constitutionality of the disclosure provisions of the FARA.²⁷ Although this Court has never expressly addressed the issue, it has assumed that the FARA is a valid exercise of Congress's plenary authority to regulate and protect the nation's foreign policy and internal security. See *Communist Party of the United States v.*

²⁷ See *Attorney General v. The Irish People, Inc.*, 684 F.2d 928, 935 & n.23 (D.C. Cir. 1982) (Wilkey, J.), cert. denied, 459 U.S. 1172 (1983); *id.* at 956 (Wald & Bazelon, JJ.); *Attorney General v. Irish Northern Aid Committee*, 530 F. Supp. 241, 253 (S.D.N.Y. 1981), aff'd, 668 F.2d 159 (2d Cir. 1982); *Attorney General v. Irish Northern Aid Committee*, 346 F. Supp. 1384 (S.D.N.Y.), aff'd mem., 465 F.2d 1405 (2d Cir.), cert. denied, 409 U.S. 1080 (1972); *United States v. Peace Information Center*, 97 F. Supp. 255, 260 (D.D.C. 1951).

SACB, 367 U.S. 1, 99-100 (1967); *id.* at 138-140 (Black, J., dissenting); see also *Viereck v. United States*, 318 U.S. at 251 (Black & Douglas, JJ., dissenting).²⁸ Moreover, this Court has upheld a variety of other types of federal disclosure laws that are similar to the FARA.²⁹

²⁸ While Justice Black disagreed with the majority with respect to the scope of the statutory registration requirements, he fully agreed with the majority's articulation of the congressional purpose underlying the Act, and he found that purpose constitutionally valid (318 U.S. at 250-251 (emphasis added)):

*The general intent of the Act was to prevent secrecy as to any kind of political propaganda activity by foreign agents. * * **

* * *

Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment.

²⁹ See *Buckley v. Valeo*, *supra* (upholding contribution disclosure requirements of the Federal Election Campaign Act of 1971); *United States v. Harriss*, *supra* (upholding disclosure requirements imposed on lobbyists by the Federal Regulation of Lobbying Act enacted as Title III of the Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 839); *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913) (upholding 39 U.S.C. (1952 ed.) 234, postal law requiring all mailed, second-class materials such as newspapers or magazines clearly to identify all paid advertisements); cf. *FCC v. League of Women Voters*, 468 U.S. 365, 395 (1984) (suggesting that the government could require public broadcasting stations to broadcast a disclaimer when they editorialize stating that the editorial does not represent the views of the government).

Even if "propaganda" is a term carrying some negative connotations and these connotations were intended, it would be surprising, indeed, if Congress had the constitutional power to establish registration and disclosure requirements relating to agents of foreign principals, but lacked the incidental authority to state an official view that such material, given its source and nature, should be viewed with skepticism. Cf. *Posadas de Puerto Rico Associates v. Tourism Co.*, No. 84-1903 (July 1, 1986), slip op. 14-15 (whether the legislature should engage in "'counterspeech'" or regulation is a matter of legislative discretion).

It is no answer to point to cases where the government expresses a view with regard to a certain category of expression and takes concrete action to impair or discourage its dissemination, which concrete action is the basis for objection. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Lamont v. Postmaster General*, 381 U.S. 301 (1965).³⁰ Here, the govern-

³⁰ In *Bantam Books*, a state commission sent notices to book distributors that certain books were obscene, and the trial court found that these notices compelled the distributors to cease selling the books and to withdraw all outstanding books from retailers. This Court found that the commission's directives constituted a series of unlawful "prior administrative restraints" (372 U.S. at 66-72) that took the form of "thinly veiled threats to institute criminal proceedings against them" (*id.* at 68).

Similarly, in *Lamont*, the statute required the Postmaster General to detain and deliver only on the addressee's request foreign mail deemed by the Postmaster to constitute "communist political propaganda." The Court invalidated the statute on the ground that "it requires an official act (*viz.*, returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights" (381 U.S. at 305; see *id.* at 307). The government's detention of

ment has not prevented appellee from exhibiting these films in any way. See T. Emerson, *The System of Freedom of Expression* 708 (1970) (*Bantam Books* is best characterized as an instance of government "action," rather than "expression").

Put more broadly, the business of legislating is the business of making value judgments, and it is unavoidable that those judgments will at times find statutory expression in words which may be taken to reflect negatively on a particular idea or point of view. This precise point was made by the District of Columbia Court of Appeals in *Block v. Meese*, slip op. 16-17:

A rule excluding official praise or criticism of ideas would lead to the strange conclusion that it is permissible for the government to prohibit racial discrimination, but not to criticize racial bias; to criminalize polygamy, but not to praise the monogamous family; to make war on Hitler's Germany, but not to denounce Nazism. It is difficult to imagine how many governmental pronouncements, dating from the beginning of the Republic, would have been unconstitutional on that view of things. Consider, for example, the disparagement of pacifism contained in the Joint Resolution of March 29, 1800, commending the action of Captain Thomas Truxton and the crew of the United States frigate *Constellation* in their engagement with the French ship of war *La Vengeance*, and specifically praising the conduct of midshipman James Jarvis, "who gloriously preferred certain death to an abandonment of his post." 2 Stat. 87 (1800). A state's selec-

the material and the requirement that a person affirmatively ask to receive it, not the label used to describe it, was found an unconstitutional infringement of the First Amendment.

tion of history and government textbooks for use in its public schools represents a most forceful and influential expression of official approval and disapproval of ideas. It cannot be a response to these points that the only subjects off-limits to the government are those as to which there is less than substantial unanimity among the people—thus permitting official positions on war heroism and motherhood, but excluding nuclear disarmament and acid rain. That distinction would raise the intolerable prospect of the courts' deciding what ideas are sufficiently popular to be granted government support—the object being, presumably, to assure that only the ideas of insular minorities will suffer official disparagement.

CONCLUSION

The judgment of the district court should be reversed and the case remanded to that court with directions to dismiss the complaint for lack of standing. In the alternative, the judgment of the district court should be reversed and the case remanded to that court with directions to enter judgment for appellants.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

1. 22 U.S.C. 611 provides in pertinent part:

§ 611. Definitions

As used in and for the purposes of this subchapter—

* * * * *

(b) The term "foreign principal" includes—

(1) a government of a foreign country and a foreign political party;

(2) a person outside the United States, unless it is established that such person is an individual and a citizen of and domiciled within the United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States; and

(3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.

(c) Except, as provided in subsection (d) of this section, the term "agent of a foreign principal" means—

(1) any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the

(1a)

order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal, and who directly or through any other person—

(i) engages within the United States in political activities for or in the interests of such foreign principal;

(ii) acts within the United States as a public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal;

(iii) within the United States solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of such foreign principal; or

(iv) within the United States represents the interests of such foreign principal before any agency or official of the Government of the United States; and

(2) any person who agrees, consents, assumes or purports to act as, or who is or holds himself out to be, whether or not pursuant to contractual relationship, an agent of a foreign principal as defined in clause (1) of this subsection.

* * * *

(j) The term "political propaganda" includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person

(1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence. As used in this subsection the term "disseminating" includes transmitting or causing to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce or offering or causing to be offered in the United States mails; * * *.

2. 22 U.S.C. 614 provides:

§ 614. Filing and labeling of political propaganda

(a) Copies to Attorney General; statement as to places, times, and extent of transmission

Every person within the United States who is an agent of a foreign principal and required to register under the provisions of this subchapter and who transmit or causes to be transmitted in the United States mails or by any means or in-

strumentality of interstate or foreign commerce any political propaganda, for or in the interests of such foreign principal (i) in the form of prints, or (ii) in any other form which is reasonably adapted to being or which he believes will be, or which he intends to be, disseminated or circulated among two or more persons shall, not later than forty-eight hours after the beginning of the transmittal thereof, file with the Attorney General two copies thereof and a statement, duly signed by or on behalf of such agent, setting forth full information as to the places, times, and extent of such transmittal.

(b) Identification statement

It shall be unlawful for any person within the United States who is an agent of a foreign principal and required to register under the provisions of this subchapter to transmit or cause to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce any political propaganda for or in the interests of such foreign principal (i) in the form of prints, or (ii) in any other form which is reasonably adapted to being, or which he believes will be or which he intends to be, disseminated or circulated among two or more persons, unless such political propaganda is conspicuously marked at its beginning with, or prefaced or accompanied by, a true and accurate statement, in the language or languages used in such political propaganda, setting forth the relationship or connection between the person transmitting the political propaganda or causing it to be transmitted and such propaganda; that the person transmitting such political propaganda or

causing it to be transmitted is registered under this subchapter with the Department of Justice, Washington, District of Columbia, as an agent of a foreign principal, together with the name and address of such agent of a foreign principal and of such foreign principal; that, as required by this subchapter, his registration statement is available for inspection at and copies of such political propaganda are being filed with the Department of Justice; and that registration of agents of foreign principals required by the subchapter does not indicate approval by the United States Government of the contents of their political propaganda. The Attorney General, having due regard for the national security and the public interest, may by regulation prescribe the language or languages and the manner and form in which such statement shall be made and require the inclusion of such other information contained in the registration statement identifying such agent of a foreign principal and such political propaganda and its sources as may be appropriate.

(c) Public inspection

The copies of political propaganda required by this subchapter to be filed with the Attorney General shall be available for public inspection under such regulations as he may prescribe.

APPELLEE'S

BRIEF

No. 85-1180

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Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

EDWIN MEESE III, ATTORNEY GENERAL OF THE
UNITED STATES, AND JOSEPH E. CLARKSON, APPELLANTS

V.

BARRY KEENE

**On Appeal from the United States District Court
For the Eastern District of California**

BRIEF FOR APPELLEE

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QUESTIONS PRESENTED

1. Whether appellee, an elected public official, has standing to challenge provisions of the Foreign Agents Registration Act (a) that designate as "political propaganda" of a foreign government three documentary films that appellee has exhibited, and intends to exhibit again, as an expression of his views on issues of public importance; (b) that require identifying labels for "political propaganda" to be made a part of the films, so that appellee is compelled either to communicate messages that disparage his own message or to act affirmatively to have the labels cut out of the films; and (c) that may cause appellee's name to be placed on permanent public file at the Department of Justice as an exhibitor of the "political propaganda" of a foreign government, where these provisions of the Act will cause appellee to suffer documented voter disapproval and thus compel him to forego exhibiting the films.

2. Whether the Foreign Agents Registration Act violates appellee's First Amendment rights by designating the films as "political propaganda" of a foreign government and further associating appellee with this designation through the required label on the films and the potential public filing of his name as an exhibitor, where any and all of these requirements will cause appellee to suffer documented voter disapproval for having exhibited films designated by United States law as the "political propaganda" of a foreign government, thus compelling appellee either to forego the exercise of his First Amendment rights or to take costly steps to rehabilitate himself with the voters in his district, where these requirements, in addition to the denigration they impose, constitute a content sensitive classification and regulation of core-value political speech that must survive "exact-ing scrutiny" under this Court's governing precedent.

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No. 85-1180

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

EDWIN MEESE III, ATTORNEY GENERAL OF THE
UNITED STATES, AND JOSEPH E. CLARKSON, APPELLANTS

v.

BARRY KEENE

On Appeal from the United States District Court
For the Eastern District of California

BRIEF FOR APPELLEE

OPINIONS BELOW

The opinion of the district court (J.S. App. 1a-31a, 36a-42a) is reported at 619 F. Supp. 1111. An earlier opinion of the district court issuing a preliminary injunction (J.S. App. 44a-65a) is reported at 569 F. Supp. 1513.

JURISDICTION

The judgment of the district court (J.S. App. 32a-34a) was entered on September 13, 1985. A notice of appeal to this Court (J.S. App. 35a) was filed on October 11, 1985. On October 29, 1985, the district court on appellants' motion modified the judgment (J.S. App. 40a). A notice of appeal to this Court from the amended judgment was filed on November 12, 1985 (J.S. App. 43a). On November 27, 1985, Justice Rehnquist extended the time for docketing the appeal to January 9, 1986, and the appeal was docketed on that date. The Court noted probable jurisdiction on April 21, 1986. The jurisdiction of this Court rests on 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides, in pertinent part:

Congress shall make no law...abridging the freedom of speech...

2. The Foreign Agents Registration Act, 22 U.S.C. 611-621 (1982), and the applicable Regulations, 28 C.F.R. 5.1-5.801 (1985).

STATEMENT

A. STATUTORY FRAMEWORK

This case challenges the provisions of the Foreign Agents Registration Act of 1938, ch. 327, 52 Stat. 631, as amended, 22 U.S.C. 611-621 (FARA), that require the filing, labeling, and reporting of "political propaganda." 22 U.S.C. § 614.

FARA requires every "agent of a foreign principal," unless exempted,¹ to file with the Attorney General a registration state-

¹ The Act provides various exemptions, including two discretionary ones. See 22 U.S.C. 612(f); 22 U.S.C. 613(f); see also 28 C.F.R. 5.305.

ment, and then at six-month intervals supplementary statements, providing specified information about the agent's relationship with the foreign principal, sources of income, and kinds of activities. 22 U.S.C. 612; see also 28 C.F.R. 5.200, 5.201; Form OBD-63. A "foreign principal" is defined as:

- (i) "a government of a foreign country";
- (ii) "a foreign political party";
- (iii) "a person outside the United States"—unless that person, if an individual, is a citizen and domiciliary of the United States, or, if a corporation or comparable entity, is organized under laws of the United States and has its principal place of business in the United States; or
- (vi) a corporation or comparable entity either organized under the laws of a foreign country or having its principal place of business in a foreign country.

22 U.S.C. 611 (b).

An "agent of a foreign principal" is defined to include any person who acts for a "foreign principal" and who directly or indirectly "engages within the United States in political activities," or in "public relations" or "information-service" activities, for the foreign principal. 22 U.S.C. 611 (c) (1) (i), (ii).

Section 4 of FARA is titled "Filing and labeling of political propaganda." It requires an agent of a foreign principal to file with the Attorney General, "not later than forty-eight hours after the beginning of the transmittal," two copies of "any political propaganda for or in the interests of such foreign principal" that the agent transmits through the United States mails or by any means of interstate or foreign commerce. 22 U.S.C. 614(a). The foreign agent also must file with the Attorney General, "for each item of political propaganda that is transmitted," a Dissemination Report "setting forth full information as to the places, times, and extent of such transmittal." *Id.*, 28 C.F.R. 5.401 (a), (b). The prescribed reporting form requires the foreign agent to state, when the material transmitted is a film, the "Name of station, organization, or theater using" the film, the "Date or dates . . . shown," and the "Estimated attendance." Form OBD-69 (now CRM-159), J.A.17.

The Attorney General is required by FARA to "retain in permanent form," as "public records . . . open to public inspection," all registration statements, "all statements concerning the distribution of political propaganda" (dissemination reports), and all "copies of political propaganda" furnished under the Act. 22 U.S.C. 614(c), 616(a). These documents remain available for public inspection and copying permanently, unless the Attorney General withdraws them because the activities of the foreign agent "have ceased to be of a character which requires registration" under the Act. 22 U.S.C. 616(a); see 28 C.F.R. 5.600, 5.601; J.A. 57.

FARA further requires that the "political propaganda" be labeled. It is made unlawful for any foreign agent to transmit the material "unless such political propaganda is conspicuously marked" with a statement, "in the language or languages used in such political propaganda," setting forth specified information. 22 U.S.C. 614(b); see also 28 C.F.R. 5.402 (a). The required statement used for films reads (J.A.16):

This material is prepared, edited, issued or circulated by (name and address of registrant) which is registered with the Department of Justice, Washington, D.C., under the Foreign Agents Registration Act as an agent of (name and address of foreign principal). Dissemination reports on this film are filed with the Department of Justice where the required registration statement is available for public inspection. Registration does not indicate approval of the contents of this material by the United States Government.

When the material transmitted is a film, the regulations provide that the foreign agent "shall insert at the beginning of such film" the required statement. 28 C.F.R. 5.402(e).

The regulations also relax, when the material transmitted is a film, the requirement that two copies be filed. The agent need not file two copies "of a motion picture containing political propaganda" so long as he files "monthly reports on its dissemination" and so long as he also submits, in each such case, "either a film strip showing the label" required by the Act or an affidavit certifying "that the required label has been made a part of the film." 28 C.F.R. 5.400(c).

The term "political propaganda" is defined by FARA to include (22 U.S.C. 611(j)):

any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to . . . in any . . . way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence. . . .

B. FACTUAL BACKGROUND

The National Film Board of Canada (Ottawa) produces films in Canada and, as an agency of the government of Canada, is a "foreign principal" under FARA. The National Film Board of Canada (New York) (NFBC) is an agent of the National Film Board of Canada (Ottawa) in the United States and has registered as a "foreign agent" under FARA since 1947 (J.S. App. 5a; J.A. 21). NFBC engages, among other things, in the "[p]romotion and distribution through commercial and noncommercial channels of Canadian Government information, documentary and cultural films, filmstrips, and other visual aid materials to public film libraries, educational institutions, government agencies, etc." (J.A. 27).

Instead of inserting the § 4 label in all the films it distributes in the United States, or deciding for itself which ones constitute "political propaganda," NFBC has been allowed to submit semi-annually a list of the titles of all its new films "for review by the Registration Unit" of the Justice Department (J.A. 57; J.S. App. 48a). By reviewing the titles, the Registration Unit decides which films warrant further review, and it requests copies of those films

for screening. J.S. App. 48a; J.A. 57; *Block v. Meese*, 793 F.2d 1303, 1307 (D.C. Cir. 1986), *cert. denied*, 106 S.Ct. 3335 (1986).

NFBC thus submitted to the Department of Justice for the six-month period ending June 30, 1982, a list of 62 titles. J.S. App. 48a; *Block v. Meese*, 793 F.2d at 1307. After reviewing these titles, the Department on September 22, 1982, requested copies of five of the films for screening. J.A. 24; *Block v. Meese*, 793 F.2d 1307. After screening the films, the Department informed NFBC on January 13, 1983, that three of them "constitute political propaganda" under FARA and hence were subject to the filing, labeling, and reporting requirements of the Act. J.A. 24; J.S. App. 5a, 48a. The three films are: "If You Love This Planet," "Acid Rain: Requiem or Recovery," and "Acid from Heaven." The first film concerns nuclear war, and was awarded an Oscar in 1983 for best foreign documentary by the Academy of Motion Picture Arts and Sciences; the latter two concern acid rain (J.S. App. 45a, 48a).

C. PROCEEDINGS BELOW

Appellee Barry Keene, is an attorney and Majority Leader of the California State Senate. He brought this action on March 24, 1983, in the United States District Court for the Eastern District of California. Appellee alleged that he desired to exhibit the three films in the California State Capitol in order to gather information and stimulate debate on the issues they addressed, but that he was deterred from doing so by the statutory characterization and the required filing, reporting, and labeling of the films as "political propaganda" (J.A. 10-14; J.S. App. 45a). If he were to exhibit the films while FARA thus applied to them, appellee alleged, "his personal, political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired" (J.S. App. 45a). Appellee sought a preliminary and permanent injunction against the application of FARA to the three films.

On May 23, 1983, the district court, ruling from the bench after a hearing, denied the Government's motion to dismiss and granted appellee's motion for a preliminary injunction (see J.S. 110). The court's opinion embodying these rulings was issued September 7, 1983 (J.A. App. 44a-65a). The court held that

appellee had standing to challenge the application of FARA to the three films (J.S. App. 49a-54a) and that his claim raised a "substantial question" (*id.* at 57a). Noting the Government's position that appellee was free to remove the required labels from the films, the court observed that "no reasonable reader of the statute and regulations could have imagined" this, and that "it is frankly surprising to learn that exhibitors of material covered by the Act may, with impunity, frustrate Congressional intent" (*id.* at 55a & n.2). The court deferred, however, to the agency interpretation (*id.*) at 54a-55a n.2.

On July 6, 1983, after obtaining the preliminary injunction from the bench, appellee exhibited the three films (J.A. 110; J.S. App. 6a n.2). They were screened in the basement of the State Capitol Building "to a standing room only audience of the general public and legislative staff" (J.A. 110). Appellee subsequently affirmed that he "intends[s] to continue to exhibit the three films periodically in the future, but only if the defendants are permanently enjoined from classifying the films as 'political propaganda'" (*id.*).

On September 12, 1985, the district court granted summary judgment for appellee on his request for a permanent injunction (J.S. App. 1a-31a). The court adhered to its prior ruling that appellee had standing to challenge the application of FARA to the three films (*id.* at 7a-16a). It found that appellee, through "declarations uncontradicted in any particular by the defendants" (*id.* at 8a), had "adequately demonstrated the probability and imminence of an injury to [his] reputation occurring by operation of the statute" (*id.* at 15a).

On the merits, the district court held that FARA's application of the "political propaganda" designation to the three films violated the First Amendment (J.S. App. 19a-29a). The court found "as a matter of fact," on the basis of "uncontradicted declarations of distinguished experts on American usage" and authoritative works on American usage, that the phrase "political propaganda," and particularly the word "propaganda," is a "semantically slanted word"—that "the term 'propaganda' as used in ordinary speech is a word of reproach" (*id.* at 19a). The court further found that the declaration of public-opinion expert Mervin Field (J.A. 68-98), "neither rebutted nor impeached by the

defendants," established "that whoever disseminates materials officially found to be 'political propaganda' runs the risk of being held in a negative light by members of the general public" (*id.* at 26a). The court thus concluded that "Congress' use of the phrase 'political propaganda' to describe the materials subject to the registration and reporting requirements constitutes a burden on speech. . . ." (*id.* at 26-27a). The court further concluded that the burden was not justified, since the governmental interest in informing recipients about the source of materials produced by or under the aegis of a foreign government readily could be achieved without branding those materials as "political propaganda" (*id.* at 27a-29a).

The court thus permanently enjoined enforcement of "any portion of the Foreign Agents Registration Act which incorporates the term 'political propaganda' as a term of art," citing 22 U.S.C. 611 (j) and 614 (a), (b), and (c). J.S. App. 31a. The court held that these provisions were separable from the rest of FARA and that its ruling therefore did not adjudicate the validity of any other part of the Act (*id.* at 30a). Subsequently, on appellants' motion to alter the judgment, the court granted the motion and modified its judgment to enjoin the enforcement of the cited provisions of the Act only as against the three films in question (*id.* at 40a).

SUMMARY OF ARGUMENT

I. Appellee has standing to challenge the application of the "political propaganda" requirements of the Foreign Agents Registration Act to the three documentary films in question here because those requirements impose actual or threatened injury on him. First, appellee has shown by uncontradicted evidence that the totality of the Act's "political propaganda" requirements will injure his reputation and impair his ability to communicate, injuries directly traceable to the Act and redressable by the Court. Second, the Act's labeling requirement compels appellee either to communicate a message with which he disagrees, a message disparaging his own speech, or to take affirmative steps to have the labels cut-out of the films. Third, the Act's reporting requirement may cause appellee's name to be reported to the Justice

Department and placed on permanent public file as an exhibitor of foreign "political propaganda."

II. The "political propaganda" requirements of the Act impose on core political speech content-based burdens that are inconsistent with the First Amendment. The three documentary films involved here, dealing with nuclear war and acid rain, constitute quintessential political speech that is entitled to the highest level of First Amendment protection. The "political propaganda" regulation that the Act imposes on this speech is content-based because it singles out political speech and, in addition, because it singles out speech from foreign sources, as opposed to domestic speech. The Act singles out foreign speech for regulation as "political propaganda" on the assumption that it is less trustworthy than domestic speech, a discrimination barred by the First Amendment.

The Act's "political propaganda" requirements burden appellee's speech by imposing a pejorative classification that impugns the credibility of his speech and exposes him to political attack and public censure. The Department of Justice has conceded that "a more neutral term like political 'advocacy' or 'information'" could be used instead, and has announced its support for such a change in the Act. Appellee has shown that his personal and political reputation will suffer if he exhibits the films while they are designated by United States law as foreign "propaganda." This designation burdens appellee's speech as well through the labeling and reporting requirements of the Act.

The burdens thus imposed by the Act on core political speech are not justified by any sufficient government interest. The asserted interest in compelling source-disclosure of foreign speech has been all but eviscerated by the Government's concession that exhibitors may remove the labels from the material. But that interest in any event constitutes impermissible content discrimination in its singling-out of foreign-source speech. It does not survive the "exacting scrutiny" that this Court has held is required to support burdens on political expression, let alone of one selected class of speakers.

ARGUMENT

I

APPELLEE HAS STANDING TO CHALLENGE THE APPLICATION OF THE "POLITICAL PROPAGANDA" REQUIREMENTS OF THE FOREIGN AGENTS REGISTRATION ACT TO THE THREE FILMS HE INTENDS TO EXHIBIT.

To establish standing to challenge a governmental action, a party must "'show that he has personally suffered some actual or threatened injury,'" that the injury "'fairly can be traced to the challenged action,'" and that the injury is "'likely to be redressed by a favorable decision.'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (citations omitted). The injury must be "'distinct and palpable,'" rather than "'abstract' or 'conjectural' or 'hypothetical,'" *Allen v. Wright*, 468 U.S. 737, 751 (1984), so that it gives the challenging party a "personal stake in the outcome of the controversy." *Larson v. Valente*, 456 U.S. 228, 238-39 (1982).

The district court correctly held that appellee had shown such actual or threatened injury resulting from the application of FARA's "political propaganda" requirements to the three films that appellee intends to exhibit.

That injury results in part from the Act's "classification" or designation of the films as "political propaganda." But, contrary to the Government's view of the case (*see, e.g.*, Brief for Appellants at 11-12, 15), the "classification" is not the only way in which FARA imposes the "political propaganda" designation on the films and thus injures appellee if he shows the films. Such an injury results also from the labeling requirement of the Act, and may result from the reporting requirement as well. Both these requirements not only impose a specific injury or potential injury on appellee in their own right, but they reinforce, cumulate, and particularize the injury to appellee's reputation that results from the Act's designation of the films as "political propaganda".²

² Appellee, of course, "may rely upon any matter appearing in the record in support of the judgment below." *Blum v. Bacon*, 457 U.S. 132,

A. FARA's Labeling Requirement Injures Appellee by Requiring Him Either to Communicate a Message Disparaging His Own Message or to Take Affirmative Steps to Have the Labels Cut Out of the Films.

Section 4(b) of FARA requires NFBC to include in any "political propaganda" it transmits a statement naming NFBC as the disseminator of the material, stating the NFBC is registered with the Department of Justice under the Foreign Agents Registration Act as an agent of a foreign government, stating the dissemination reports and the registration statement are on public file at the Department of Justice, and stating that "[r]egistration does not indicate approval of the contents of this material by the United States Government." 22 U.S.C. 614(b); J.A. 16. When the material disseminated is a film, NFBC must "insert [the statement] at the beginning of such film" (28 C.F.R. 5.402(e)) so that "the required label has been made a part of the film" (*id.*, 5.400(c)).

This labeling requirement injures appellee—thus giving him standing to challenge the requirement and the "political propaganda" designation from which it flows—in either of two ways.

If the label is still a part of the film when appellee exhibits the film, appellee is injured by being forced to communicate a message with which he disagrees, a message that disparages his own message reflected in the film. It does not matter that, as the Government stresses (Brief for Appellants at 4, 11, 15), the required label used for films does not itself use the phrase "political propaganda."³ The label nonetheless serves to give warning about, and disparage, the film in which it appears.⁴ And

137 n.5 (1982); see also R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 382, 422 (6th ed. 1986).

³ Section 4(b) of the Act, requiring the label, uses the phrase eight times (22 U.S.C. 614(b)). The dissemination reports that the label says are on file at the Justice Department describe the material as "propaganda" (J.A. 17).

⁴ See the letter from the Deputy Attorney General stating that the Department of Justice would "favor amending the Act to permit use of simpler and more neutral language in the disclosure label, to avoid unnecessary negative connotations that may be inferred from the disclo-

the label constitutes speech of a third party—the United States Government—that appellee is forced to communicate despite his disagreement with it. In *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 106 S.Ct. 903 (1986), the Court held that the First Amendment rights of a utility company were infringed when it was required "to include in its billing envelopes speech of a third party with which the utility disagrees" (*id.* at 905 (opinion of Powell, J.)). The company's claim of "a First Amendment right not to help spread a message with which it disagrees" (*id.* at 907) was upheld.⁵ See also *Wooley v. Maynard*, 430 U.S. 705 (1977); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

The Government has taken the position, however, that while NFBC is required to make the label a part of the film, appellee is free to remove the label (J.S. App. 54a-55a). As the surprised district court pointed out, this position frustrates the asserted governmental interest in imposing the labeling requirement.⁶ The government's evisceration of the statutory requirement does not mean, however, that the requirement no longer imposes any injury on appellee.⁷

While the Government says appellee is "free to remove" the label that NFBC must include in the film (Brief for Appellants at

sure statement (as, for instance, from the current statement that the United States Government has not approved the contents of the message)." J.A. 118.

⁵ In *Pacific Gas & Electric*, no question appears to have been raised about the utility company's standing to challenge the billing-envelope requirement. See 106 S.Ct. 903-924 *passim*.

⁶ J.S. App. 55a n.2. See also Brief for Appellants at 18 n.11 (statutory objective "to allow public appraisal of foreign source material in light of the identity of its source.").

⁷ This is apart from the more conspicuous First Amendment injury that the requirement imposes on the foreign agent, who is required to communicate the government's message disparaging the agent's own message and is *not* allowed to remove it. 22 U.S.C. 614(b); 28 C.F.R. 5.402(e). "Freedom of speech and of press is accorded aliens residing in this country." *Bridges v. Wixon*, 326 U.S. 135, 148 (1945); See also *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

5), action is thus required of appellee. It is not a matter of simply peeling a pasted label off the surface of a book. The regulations require the label to be "made a part of the film" (28 C.F.R. 5.400(c); see also *id.* 5.402(e)).⁸ Appellee is not a commercial or professional film exhibitor, and there is no reason to assume that removing a label that has been made a part of the film is something he can do without any effort, expense, or delay.⁹ In *Lamont v. Postmaster General*, 381 U.S. 301, 303-05 (1965), the Court held it an abridgment of First Amendment rights to require an addressee simply to send a reply card to the Post Office in order to receive mail designated as "communist political propaganda."¹⁰ The Court stated (*id.* at 307):

We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him.¹¹

⁸ While Section 5.400(c) relieves the registrant of the obligation to file two copies of the film if the registrant demonstrates or certifies that the label "has been made a part of the film," there is no reason to doubt that the same requirement applies when two copies are submitted; the proof is then supplied by the copies themselves. See also 28 C.F.R. 5.402(e).

⁹ Moreover, if appellee rents or borrows the films, he might well be required not only to cut the labels out before exhibiting the films but also to put them back in before returning the films to their owner.

¹⁰ The latter two words were defined according to FARA itself. 381 U.S. at 302-03.

¹¹ Just as the Court in *Lamont* also found the mailing requirement "almost certain to have a deterrent effect, especially as respects those who have sensitive positions" (381 U.S. at 307), so the injury to appellee's reputation would be increased if it could be said of him not only that he had shown films officially classified as "political propaganda" of a foreign government, but that before showing them he had cut out identification statements put there by order of United States law in order to inform the viewers about the foreign source. *Cf., e.g.,* J.A. 69 (Declaration of Mervin D. Field, par 5), referring to J.A. 81; J.A. 37

In *Lamont* there was no question raised about the plaintiff's standing.¹²

Likewise here, the Government's dispensation to cut the labels out of the films still imposes on appellee an "affirmative obligation," thus giving him standing to challenge the requirement that makes the labels a part of the films. *United States v. SCRAP*, 412 U.S. 669, 689 n. 14 (1973) (citations omitted).

B. FARA's Reporting Requirement Threatens Injury to Appellee Because It May Cause His Name to Be Reported to the Department of Justice and Placed on Permanent Public File as an Exhibitor of the "Political Propaganda" of a Foreign Government.

If the three films constitute "political propaganda" under FARA, as the Department of Justice has determined (J.A. 24), then NFBC is required to file with the Department monthly reports on their dissemination. 22 U.S.C. 614(a); 28 C.F.R. 5.400(c), 5.401; J.A. 22 (par. 3), 65 (par. 3). The Act requires a report "setting forth full information as to the places, times, and extent of such transmittal (22 U.S.C. 614(a)). The reporting form specified by the regulations requires the foreign agent to state, if the material transmitted is a film, the "Name of station, organization, or theater using" the film, together with the "city and state" (emphasis in original), the "Date or dates . . . shown," and the "Estimated attendance." 28 C.F.R. 5.401(b); Form OBD-69 (now CRM-159); J.A. 17.

To be sure, although appellee intended to, and did, exhibit the films to substantial audiences in public (J.A. 46-47, 110), appellee probably is not a "station, organization, or theater" within the language of the form. The relevant question, however, is not only whether NFBC would be required, as a matter of law, to report appellee's name on the form. Equally relevant is the possibility that NFBC *will* report appellee's name. That possibility is real.

(Declaration of David I. Freed, par 10); J.A. 30 (Declaration of Harry Bistrin, par IV); J.A. 39 (Declaration of Donald T. Peterson, par 12).

¹² The district court, in the case from which the Government had appealed, had expressly held that the plaintiff had standing. *Heilberg v. Fixa*, 236 F.Supp. 405, 407 (N.D.Cal. 1964). That conclusion was not questioned by this Court.

The purpose of the form (and the Act) covers reporting on the public exhibition of films by a public official such as appellee, and another question on the form in fact lists "Public Officials" among "organizations" receiving the material. J.A. 17 (Question 11). In reporting on the dissemination of its many films to many parties, NFBC has little incentive, and probably not the trained personnel, to make the investigations necessary to avoid reporting the names of parties that may not legally constitute a "station, organization, or theater." It may well be easier to report everybody, or at least all "public officials."¹³

There is thus a real likelihood that, whether through caution or inadvertence on NFBC's part, appellee's name will be reported to the Justice Department and placed on permanent public file as an exhibitor of the "propaganda" of a foreign government. "The possibility" that this will happen "is not 'imaginary or speculative,' " but "quite realistic." *Blum v. Yaretsky*, 457 U.S. 991, 999-1001 (1982) (citation omitted). If it happens, the injury to appellee will be substantial. Copies of the Dissemination Reports might be used to devastating effect, for example, by his political opponents. See J.A. 39-40 (tactic of last-minute campaign mailer).

The threat posed by FARA's reporting requirement thus gives appellee "a personal stake in the outcome of the controversy." *Larson v. Valente*, 456 U.S. 228, 238-39 (1982) (citation omitted). It constitutes threatened injury to appellee both in itself and in combination with FARA's other applications to the three films. See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 139-41 (1951); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965); *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 98 (1982). In *Block v. Meese*, involving the application of FARA to the same three films, the court found

¹³ This is especially so since the Act provides criminal penalties of up to five years' imprisonment, a fine of up to \$10,000, or both, for anyone who in a dissemination report willfully omits a material fact "necessary to make the statements therein . . . not misleading" (22 U.S.C. 618 (a) (2)), and since it further provides for the deportation of any alien convicted of violating the Act "or any regulation thereunder" (22 U.S.C. 618 (c)).

it established "that the NFBC's setting forth in a publicly available report the names of organizations and theaters using the films . . . creates a disincentive to acquire those films" (793 F.2d at 1308). The court said that the main reason for the disincentive was, "obviously, . . . the political aversion of these public instrumentalities"—members of the plaintiff New York Library Association—"to being identified as distributors of a 'propaganda' film" (*id.*).¹⁴

Appellee has shown a similar disincentive. The injury to his reputation that he has shown would result from public knowledge that he had exhibited three films officially designated as foreign "political propaganda" would be increased if, in addition, his name were listed on permanent public file at the Justice Department as a purveyor of such "propaganda."

C. Appellee Has Shown That the Application Of FARA to the Films He Intends to Exhibit Will Cause Him Injury-in-Fact by Threatening His Reputation and Impairing His Ability to Communicate.

The Justice Department has ruled that the three films constitute "political propaganda" under FARA, with the result that NFBC must include in the films the required label and must file with the Attorney General, for permanent public inspection and copying, reports on NFBC's dissemination of such "propaganda." J.A. 16-18; 22 U.S.C. 614(a), (b), 616 (a). Appellee has shown that FARA's application to these films, which he has exhibited and intends to exhibit again, will hurt his reputation and his ability to communicate.

¹⁴ Some of the plaintiffs in *Block v. Meese* were held to have standing to challenge FARA's classification and reporting requirements (793 F.2d at 1308-09) on much less substantial a showing of harm. For example, plaintiff Block, a film distributor, was said to have standing because of economic injury caused by the reluctance one organization had in obtaining the film, without any evidence that sales were not increased by the films' notoriety. Appellee, however, is not complaining that his audience for his showing would be reduced because of government action, but of the risk that the much larger audience that is his constituency would be influenced against him because he disseminated what the government characterized as the political propaganda of a foreign power.

As the Government concedes, injury to reputation may serve as a basis for standing. Brief for the Appellants 14. It could hardly be otherwise, for damage to reputation has long been recognized as a legal injury. See, e.g., *Gertz v Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). Thus in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 139-41 (1951), where three organizations sought declaratory and injunctive relief after having been designated "Communist" by the Attorney General under an Executive Order, the Court held that they had standing based on the damage to their reputations and the consequences flowing from that damage. *Id.* at 140-41 (opinion of Burton, J.), 157-60 (opinion of Frankfurter, J.), 174-75 (opinion of Douglas, J.).

In this case appellee has presented declarations, which "defendants have failed to counter, by affidavit or otherwise" (J.S. App. 8a), establishing his claim that "exhibition of the films which the statute characterizes as 'political propaganda' will brand [appellee], as a purveyor of propaganda, which will have an adverse impact on [appellee's] professional and personal reputation" (*id.* at 52a).¹⁵

¹⁵ Appellee has presented, for example, a Gallup public opinion study designed and interpreted by Mervin Field as indicating that a campaign charge of having exhibited films "that the United States Justice Department had officially classified as 'political propaganda' would have a 'seriously adverse effect' on the electoral chances of a candidate for the California Legislature (J.A. 69, 81). Appellee has presented a declaration from a person intimately familiar with his State Senate district stating that high unemployment in the district has created "a clear and well-defined resentment to foreign competition," that in past elections appellee "has been attacked . . . for such otherwise mundane matters as the wearing of a beard and the driving of a foreign car," and that "I have no doubt that [members of the press and political opponents] would openly seize upon the opportunity to utilize the government's reporting, dissemination and label requirements under FARA to their benefit by portraying [appellee] as a disseminator of 'foreign political propaganda'" (J.A. 29-30). Moreover, appellee has presented a declaration from a political expert on his district stating that in his opinion appellee's re-election chances "could be harmed substantially should a political opponent be able to associate [him] with 'foreign political propa-

Appellee also has shown that FARA's application to the films will injure him by impairing his ability to communicate his political views. His declarations attest, as the district court found, that "the term 'propaganda' as used in ordinary speech is a word of reproach" (J.S. App. 19a)—that "calling something propaganda amounts, for all practical purposes, to saying that it is not worth considering, that it is to be dismissed" (J.A. 108 (Edwin Newman)). Impairment of the credibility of foreign-source material is, indeed, FARA's purpose. As the Government states, "anyone aware of the statutory objective—to allow public appraisal of foreign source material in light of the identity of its source—is likely nonetheless to approach the material with a sense of skepticism" (Brief for the Appellants, at 18 n.11). As the Government further states, "the congressional purpose underlying the Act" was "to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source." *Id.* at 35 n.28 (quoting *Viereck v. United States*, 318 U.S. 236, 251 (1943) (Black, J., and Douglas, J., dissenting)).

It is more than sufficient for standing purposes that this official stamp of untrustworthiness placed by the United States Government on information of foreign origin may impair appellee's ability to communicate his views. See *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *id.* at 308 (Brennan, J., concurring).¹⁶

ganda,'" and that a last-minute campaign mailer making such a charge "would have a significant impact on the vote, particularly in Solano County, the home of large and important Naval and Air Force bases" (J.A. 39-40). And appellee has presented the declaration of the managing partner of his former law firm that he "will not sacrifice the reputation of this firm or its clients" and therefore will bar appellee from future employment with the firm unless appellee "forebear from exhibiting the subject films" while the federal government requires that they "be registered and labeled as foreign propaganda." J.A. 36-37. Appellee left the firm prior to the oral argument on the cross-motions for summary judgment and so informed the district court.

¹⁶ The Government's reliance on *Laird v. Tatum*, 408 U.S. 1 (1972), is misplaced. In *Laird* plaintiffs offered no evidence at all to indicate that their alleged fear of a "police-state" style round-up of political dissidents

D. The Threatened Injuries Are Fairly Traceable to FARA and Redressable by the Court.

The harm caused to appellee's reputation and communicative ability, as well as the harm of being compelled either to communicate the government's message or to have it cut out of the films, is fairly traceable to the existence and application of FARA. "[C]onstitutional injury-in-fact . . . requires no more than *de facto* causality," and "[i]t is impossible to maintain, of course, that there is no standing to sue regarding action of a defendant which harms the plaintiff only through the reaction of third persons." *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir., 1986), *cert. denied*, 106 S. Ct. 3335 (1986). See also *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. at 141; *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. at 97-98; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963).

Nor would it be relevant to the causal link if, as the Government contends, the public's reaction constituted a misinterpretation of what was actually a neutral congressional purpose. See *Block v. Meese*, 739 F.2d at 1309.¹⁷

The Government's other arguments relating to the lack of a causal connection are equally unfounded. While the Government seems to imply that the likelihood of the public's becoming aware of the designation of these films as "political propaganda" is slim (Brief for the Appellants, at 15), appellee has offered uncontro-

was reasonable. Here, appellee has proved that the government's action in applying FARA to these films will injure his reputation, discredit his speech, and force him either to communicate the government's message or take steps to cut it out of the films. Accordingly, "the threat is quite realistic." *Blum v. Yaretsky*, 457 U.S. 991, 1001 (1982).

¹⁷ The two cases the Government relies on to defeat a casual connection are inapposite. See Brief for Appellants, at 15-16. *Allen v. Wright*, 468 U.S. 737, 758 (1984), and *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42-46 (1976), both involved challenges to Internal Revenue Service policies, and the casual chains depended on third parties' taking particular actions as a result of their tax status. It was a matter of "pure speculation" whether the third parties, such as school parents and hospitals, would alter their behavior as a consequence of tax policies. *Allen*, 468 U.S. at 758; *Eastern Kentucky*, 426 U.S. at 42-43.

verted evidence indicating how readily this information would be made known to the public. See, e.g., J.A. 30, 40. While appellee does not rely solely on his position as an elected official to demonstrate injury to his reputation, his political position increases the likelihood that the public quickly will be made aware of the special legal status of his speech. Moreover, as Amici have pointed out, there can be no serious question that the public in fact became aware of FARA's application to these films, which was widely reported in the media.¹⁸ Furthermore, as the Government contends (see Brief for the Appellants 23-26 ns. 19, 20, 22), the ostensible purpose of FARA, through requiring public disclosure, was to assure public awareness of the materials classified as political propaganda and of the persons disseminating those materials. It is more than a little contradictory to attempt on the one hand to justify the Act as a "sunshine" law, and on the other to argue that appellee will not be harmed because the Government will keep secret its classification of the films.

Finally, there can be no question that the threatened injury is redressable by the court. If the Government is permanently enjoined from enforcing the Act against these three films, the threatened injury to appellee will disappear. See *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978).

Appellee thus has standing to challenge the application of FARA to the three films as a violation of his constitutional rights.

¹⁸ See Brief for Amici Mitchell Block Et Al., at 16 n.9.

II

THE OFFICIAL REVIEW, CLASSIFICATION AS POLITICAL PROPAGANDA AND CONSEQUENT REGULATION OF SPEECH ON MATTERS OF PUBLIC CONCERN ACCORDING TO ITS CONTENT AND SOURCE CONSTITUTE A FORBIDDEN CONTENT-BASED DISCRIMINATION THAT ABRIDGES APPELLEE'S RIGHTS TO RECEIVE, BE INFORMED BY AND INFORM OTHERS THROUGH SPEECH DESIGNATED FOR SUCH TREATMENT AND TO USE SPEECH SO TREATED TO EXPRESS HIS OWN VIEWS, WHERE, AS HERE, THE BURDENS IMPOSED BY THE GOVERNMENT ON FREE EXPRESSION DO NOT RELATE RATIONALLY TO A LEGITIMATE GOVERNMENTAL PURPOSE, OR—AS THE CONSTITUTION REQUIRES—DO THEY FLOW FROM A NARROWLY DRAWN EFFORT TO FURTHER A SUBSTANTIAL STATE INTEREST.

A. FARA § 4 Is a Classic Example of Content-Based Government Regulation of Core-Value Protected Speech.

To come within the purview of FARA § 4, speech must be determined to be intended or reasonably adapted to "prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient" with regard to the "political or public interests, policies or relations of a foreign country or foreign political party" or in respect to the foreign policy of the United States. FARA, § 1(j). FARA regulation is thus expressly dependent upon a finding that speech on behalf of a foreign country, organization, enterprise or individual contains political or public policy content.

As such, the FARA is a classic content sensitive regulation of core-value political speech¹⁹ without parallel in recent American history, reminiscent of the Alien and Sedition Act. *New York*

¹⁹ Speech concerning matters of public importance has long been recognized as consistent with the highest values afforded protection under the First Amendment. Eg., *Carey v. Brown*, 447 U.S. 455, 467 (1980) ("the highest rung on the hierarchy of First Amendment values.").

Times v. Sullivan, 376 U.S. 254, 273-276 (1965).²⁰ It implicates the single most crucial protection afforded by the First Amendment, the heart of the law of free speech:

[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.

Police Department of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

Content sensitive burdens on speech are no more valid because they do not impose "restrictions on particular viewpoints," *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 537 (1980), nor "depend upon the identity of its source." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978), or restrict only recipients rather than speakers. *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) ("It would be a barren marketplace of ideas that had only sellers and no buyers." (Brennan, J., and Goldberg, J., concurring)).²¹

²⁰ See, *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984) (ban on public broadcast editorials); *Carey v. Brown*, 447 U.S. 455, 467 (1980); *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980) (restriction on political speech); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 (1978) (ban on political speech); *Elrod v. Burns*, 427 U.S. 347, 362 (1976); *Virginia Bd. Of Pharmacy v. Va. Consumers Council*, 425 U.S. 748 (1976) (ban on commercial speech); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Lamont v. Postmaster General*, 381 U.S. 301, 402 (1965) (burden on receipt of communist political propaganda); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (punishment for criticizing public official); *Talley v. California*, 362 U.S. 60, 65 (1960), (handbill ordinance requiring identifying information).

²¹ The basis of content-discrimination in FARA lies in the statute's singling out, for imposition of its "political propaganda" requirements, speech from foreign sources. It is not all political speech, not all "expressions designed to further one's cause" (Brief for Appellants 25), but only one variety of political speech upon which FARA imposes its badge of "political propaganda". On many international political issues, FARA's discrimination against foreign-source speech thus "suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people." *First National Bank of Boston v.*

Consequently, the statute here falls squarely within that category of cases to which this Court has applied the strictest constitutional standards in scrutinizing the impact of the challenged legislation upon the exercise of "uninhibited, robust, and wide-open debate," *New York Times v. Sullivan*, 376 U.S. 254, 270 (1965), irrespective of whether the burden imposed on participation in public affairs results "indirectly" from the fear of public disapproval, *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). Thus, a content based system of government classification of political speech as foreign political propaganda may be upheld only if it survives the

exactng scrutiny necessitated by a state-imposed restriction of freedom of speech. Especially where . . . a prohibition[, burden or restriction²²] is directed at speech itself, and the speech is intimately related to the process of governing, "the State may prevail only upon showing a subordinating interest which is compelling," *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); see *NAACP v. Button*, 371 U.S. 415, 438-439 (1963); *NAACP v. Alabama ex rel Patterson*, 357 U.S., at 463; *Thomas v. Collins*, 323 U.S. 516, 530 (1945), "and the burden is on the government to show the existence of such an interest." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). Even then, the State must employ means "closely drawn to avoid unnecessary abridgment. . . ." *Buckley v. Valeo*, 424 U.S., at 25; see *NCAAP v. Button*, *supra*, at 438; *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

First Nat'l Bank of Boston v. Bellotti, *supra*, at 786.

Bellotti, U.S. at [98 S. Ct. at 1421]. As a result, "the First Amendment is plainly offended." *Id. Accord, Pacific Gas & Electric Co. v. Public Utility Commission*, 106 S.Ct. at 907 (opinion of Powell, J.); *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. at 533. See *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 106 S. Ct. 2968 (1986), 2986 (Stevens, J., dissenting); *id.* at 2979 n. 9 (opinion of court).

²² Burdens, as much as prohibitions and restrictions, are subject to the strict scrutiny standard, even where "concededly very slight." *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 106 S.Ct. 903, 916 (1986) (Marshall, J., concurring).

B. FARA § 4 Regulation of the Three Canadian Documentary Films Acts as a Barrier to Appellee's Receipt and Exhibition of the Films and to Their Viewing by His Intended Audience, and Penalizes His Use of Them to Communicate With the Public.

The record is replete with evidence that establishes the pejorative nature of the term political propaganda,²³ particularly where used as an official government classification, both as to the credence to be given the information it conveys and the stigma attached to its dissemination.²⁴

Likewise, the record contains substantial evidence of the manner and type of harm appellee would suffer should the Canadian films be made subject to FARA regulation.²⁵

²³ The first dictionary definition to refer to the disrepute in which political propaganda was held can be found in Brande, *Dictionary of Science, Literature and Art* (1842): "the name *propaganda* is applied in modern political language as a term of reproach to secret associations for the spread of opinions and principles which are viewed by most governments with horror and aversion." (Emphasis in original).

²⁴ See, Declaration of Mervin D. Field (J.A. 68); Declaration of Leonard Wood (J.A. 78); Declaration of Leonard W. Doob (J.A. 99). The Department of Justice itself, contemporaneously with this litigation and with specific reference to the application of FARA to these three films, has conceded that the term "propaganda" as used in the Act is not wholly neutral. Deputy Attorney General Schmuts, in conveying "the views of the Department of Justice" on August 8, 1983, to the chairman of the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, stated that the Department would "support the use of a more neutral term like political 'advocacy' or 'information' to denominate information that must be labelled." J.A. 118; see also *id.* at 116, 117. This concession belies the Government's claim here that FARA embodies a "neutral use of the term 'propaganda'" (Brief for the Appellants at 18).

²⁵ Affidavit of Barry Keene (J.A. 19-20); Declaration of Harry Bistrin (J.A. 28); Declaration of David I. Freed (J.A. 34); Declaration of Donald Petersen (J.A. 38); Declaration of Mervin D. Field (J.A. 68); Declaration of Leonard Wood (J.A. 78); Declaration of Barry Keene (J.A. 109); Conference Report: AB 406 (J.A. 112).

None of the evidence on either factual question has been impeached, rebutted or even contradicted by the Government. The district court was therefore justified—indeed, it had no choice—in finding that the derogatory meaning of the political propaganda designation and the consequent burdens on appellee's First Amendment liberties had been conclusively established as a matter of law. *Keene v. Meese*, J.S. 19a-20a, 26a-27a.

As the district court recognized, (*Keene v. Meese*, J.S. at 25a), whether Congress intended its employment of an inflammatory phrase in describing speech to be regulated so as to suppress such speech is irrelevant to the issue of abridgement. *E.g.*, *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 592 (1983). Moreover, as set forth, *infra*, Congress clearly intended FARA regulation to reduce the dissemination and persuasive impact of the speech of registered agents.

It is more than sufficient, however, that the record amply demonstrates the harm to speech regulated under § 4 and the injury to appellee and his audience which would flow from regulation of the films under the FARA. These are factual issues, addressed by findings supported in the record of this case. The Government's attempt to finesse the factual basis of the judgment below by reference to inapposite canons of statutory construction should be rejected.

1. The term "political propaganda" unmistakably impugns the credibility of the speech to which it is applied.

The evidence in the record as well as available dictionary references of which the court below took judicial notice establish beyond doubt that the term "propaganda" when used to describe speech addressed to a public issue is intended to denigrate the information conveyed by the speaker as unworthy of the listener's trust, slanted by self-interest and, most importantly, the product of an effort to persuade or motivate unbound by an adherence to an objective standard of truth.²⁶ Unlike mere advocacy, with its

²⁶ *E.g.* Declaration of Leonard Doob, Sterling Professor Emeritus of Psychology of Yale University and perhaps this country's preeminent authority on the history and nature of propaganda (J.A. 101): "[I]t is my judgment that the designation 'political propaganda' . . . is pejorative, denigrating to the material, and stigmatizing to those disseminating

evidentiary standards and rhetorical conventions,²⁷ propaganda is commonly understood to contain "half-truths, distortions and omissions," *Keene v. Smith* (J.S. 59a), deliberately chosen for their persuasive effect, especially as regards their impact on the emotions of the audience.

Nothing about this Court's occasional use of the word is inconsistent with its modern meaning. The "blare of political propaganda," *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974), thought to result from extending a constitutional right of access to public transit vehicles for political advertising is hardly a term of respect used in describing the speech at issue. In a similar vein is this Court's reference to "union propaganda" in *National Association of Letter Carriers v. Austin*, 418 U.S. 264, 279 n. 14 (1974). The Court in that case distinguished union propaganda from "other method[s] of peaceful persuasion," *Id.*, and has in the past been careful not to restrict union membership campaigning to any ethical standard or code of conduct beyond the requirements of lawful behavior, which have never been determined to require unions, or management, to avoid the use of "lawful propaganda," *NLRB v. Drivers Local 639*, 362 U.S. 274 (citation omitted) (1960), in the heat of an organizational drive.

The court in *Block v. Meese*, 793 F.2d 1303 (D.C. Cir., 1986), however, adverted to a razor-thin distinction between the public's "regard[]" for political propaganda and what the term is actually

it. . . . [T]o call something propaganda is to assert that it communicates hidden or deceitful ideas; that concealed interests are involved; that unfair or insidious methods are being employed; that its dissemination is systematic and organized in some way that distinguishes it from, for example, the simple release of films or magazines in this country; and that some manipulation is involved."

²⁷ Lawyers—our culture's professional advocates—are required to adhere to codes of conduct which, for example, constrain "us[ing] . . . any form of public communication containing a false, fraudulent, misleading . . . or unfair statement or claim" (Code of Professional Responsibility of the American Bar Association, DR-2-101(A)); "tak[ing] . . . action on behalf of a client . . . when it is obvious that such action would . . . merely . . . injure another (id., DR 7-102(A)(1)); "knowingly mak[ing] a false statement of law or fact" (id., (A)(5)); or assisting his client in perpetrating a "fraud upon a person or tribunal." *Id.*, (B)(1).

understood to “mean,” *Id.*, at 1312 (emphasis in original), on its way to deciding that the public’s distaste generally for political advocacy, rather than any distinct type of political advocacy known as propaganda, was the cause for the suspicion afforded the latter. Whether or not this distinction better reflects the state of linguistic affairs than the expert opinion and authoritative references on modern usage in the records of both this case and *Block* can have no effect in reviewing the decision here, since, unlike in *Block*, the findings in this case are reviewed within the context of the substantial evidence rule, a standard surely met by the record evidence supporting the district court’s analysis of the meaning of political propaganda.

To the extent that that distinction may be valid, however, it is clearly one without a difference, irrelevant to determining the impact of the classification scheme at issue here on the credibility afforded by the public to speech officially classified as propaganda. It is precisely because such speech is “regarded as more likely than other speech,” *id.*, to be intentionally misleading that speech labeled as propaganda is mistrusted, and it is precisely the mistrust created by the statutory classification of some speech on public policy matters as political propaganda which caused the district court to determine that “[t]o characterize a particular expression of political ideas as ‘propaganda’ is to denigrate those ideas.” *Keene v. Smith*, J.S. 59a.

It is no answer to point to the definition of political propaganda set forth in § 1(j) in suggesting that the public has misunderstood a characterization which the Government concedes tends to “induce[] a reaction of suspicion and caution, . . . due not to the word but to the phenomenon it describes . . .” (Brief for Appellants, 30). Appellants argue here, as they did below, that the § 1(j) definition of “political propaganda,” being both neutral by its terms (Brief for Appellants, 22-26) and as applied (Brief for Appellants, 27-28), forecloses judicial inquiry into whether or not “extraneous potential connotations” (Brief for Appellants, 31) “with a negative meaning for some members of the public,” (Brief for Appellants, 33) were either intended by Congress to result from FARA’s description of § 4 regulated speech as “political propaganda,” or, whether intended or not, result in the abridgement of appellee’s First Amendment liberties.

The Government misreads the FARA’s legislative history and badly misconceives both the pertinent decisions of this Court and the district court’s inquiry into Congressional intent; appellants consequently misconstrue this Court’s decisions concerning statutory construction and judicial inquiry into legislative motive as being applicable to deciding whether FARA § 4 abridges appellee’s speech.

First, the district court did not, contrary to what the Government indicates, look behind the plain meaning of the language used in §§ 1 and 4 so as to construe how the statute should be applied to the Canadian films or to determine the meaning of the term “political propaganda.”²⁸ Rather, the district court determined, on the basis of uncontradicted and substantial expert testimony and other authoritative evidence, that the suspicion and caution with which speech classified as political propaganda may be regarded results directly from it being so classified, without reference to whether Congress intended that result.

Second, irrespective of the broad, inclusive nature of the § 1(j) definition, to place a semantic scalpel between the meaning of the words “advocacy” and “propaganda” on the basis solely of how *widely distributed*, (*Block v. Meese, supra*, at 1312), political speech is intended to be, blurs the difference between them rather than illustrating how the latter word may define a “type of political speech . . . which no other english word accurately describes,” *id.*, cutting against the Government’s argument that “any negative connotations of the phrase” derive from the peculiar phenomenon which it describes, (App., at 30), especially since nothing in either §§ 1 or 4 limits FARA regulation on the basis of the size of the audience for which FARA regulated

²⁸ In fact, the court expressly declined to rest upon the ground that the statute had been misapplied to the films, (*Keene v. Meese*, J.S. 22a), and found §§ 1 and 4 “relatively unambiguous” so as not to require resort to legislative intent to determine their meaning, (*Keene v. Meese*, J.S. 21a), but, instead, determined that the legislative history demonstrates Congress to have intended the statutory description of § 4 speech itself as a means of suppression, on a constitutional par with other, well established, speech abridgements, thus clearly coming within the scope of the First Amendment’s delimitation of Congressional power (*Keene v. Meese*, J.S. 24a-26a).

speech is intended. In any event, it is ludicrous, at least in this context, to pretend that a negative reaction to a "phenomenon" is any different than the reaction to the word which describes it—words being themselves merely symbols in aid of communication about, *e.g.*, things, places and actions that commonly enjoy an existence apart from the words used to describe them. There simply is no evidence in the record indicating either that the terms "political advocacy" and "political propaganda" describe the same phenomenon, or that the public would come to view with "the same degree of scepticism," (*Block v. Meese, supra*, at 1312) material classified with reference to a less inflammatory label.²⁹

Third, and finally, to the extent that the FARA definition may be described as a "neutral" or "objective" description, it serves to heighten rather than diminish the derogation of political speech regulated under § 4, since it is the appearance of neutral, authoritative and dispassionate legal procedures which creates in an official content-based classification scheme the special power to destroy the fair opportunity to compete for acceptance in the marketplace of ideas that the First Amendment guarantees to

²⁹ There is no issue whatsoever presented by this case having anything at all to do with the principles of statutory construction relied on by appellants—dismissed by the district court as "bootstrapping." *Keene v. Meese*, J.S. 21. When the effect of the meaning produced by a statute is unconstitutional, or defamatory (*see, e.g., Joint Anti-Fascist Refugee Committee*, 341 U.S. at 141 (opinion of Burton, J.), 142-43 (opinion of Black, J.)), the government cannot disclaim responsibility on the basis of its own private definition. But even if the term, and the regulatory scheme based on it, indeed involved no more than neutral identification of "an objective category of speech," with no disapproval being expressed by the government, the question remains why that "objective category" has been limited to *foreign* speech, and how the limitation can be squared with First Amendment constraints against content discrimination. *See, e.g., Posadas de Puerto Rico*, 106 S.Ct. at 2979 n.9; *id.* at 2986-87 (Stevens, J., dissenting). It may be that "one would not describe the ideological efforts of one's own church or nation as 'propagandizing'..." (793 F.2d at 1312), but it does not follow that such discrimination, when made the fulcrum of a regulatory scheme imposing burdens on speech, passes muster under the First Amendment.

political expression. It is not difficult to see how the term "political propaganda," when applied to the speech of a foreign nation by a unit of the Internal Security Section of the Criminal Division of the Department of Justice, brands such speech as intended to promote false doctrine without regard—or expressly hostile to—the best interests of the United States. *First National Bank of Boston v. Bellotti, supra*, at 777 n. 11.

Consequently, subjecting speech to governmental review and subsequent classification as political propaganda appends to § 4 speech a label of mistrust that sets it apart from, and hobbles it in competition with, other expressions of ideas concerning the same subject matter against which it is pitted in a struggle for attention and acceptance.

B. A Legislator and Attorney Sworn to Uphold the United States Constitution and Expected to Act in the Best Interest of His Constituents and His Country Risks Political Attack and Public Censure Proximally Resulting from the Government's Designation of the Films as Foreign Political Propaganda.

One of the ways in which § 4 handicaps the speech it regulates is to make it unavailable to those, such as appellee, for whom the public's mistrust of speech officially branded as the political propaganda of a foreign power renders the use of such material, irrespective of its merits, too risky a proposition when compared with the invaluable but intangible benefits to be derived from the free exercise of political liberty in a particular instance and amongst a limited number of people.

As set forth extensively in Section I, *supra*, see also n. 14, *supra*, the burdens on appellee's rights to receive and exhibit the Canadian films have been amply documented by uncontradicted relevant record evidence. He may not exhibit the films if they are made subject to § 4 classification and regulation, since to do so would risk damaging the regard in which he is held by the voters in his district, who in turn may easily be made aware of appellee's use and approval of the films, for example, by a political opponent

in the waning days of an election with the aid of a district-wide mailer known in California politics as a "hit-piece."³⁰

The risk of voter disapproval³¹ engendered solely because of the Government's characterization of the films is not one that any politician can afford to take lightly. This is especially so here, given the demographics of appellee's district—including a large military population and many persons whose livelihoods are dependent upon timber harvesting, an industry depressed, in part, because of foreign competition.³²

For a veteran public official, these matters are self-evident. Out of an abundance of caution and in an effort to illustrate the national, as well as the local, implications of the FARA classification scheme for state officials who might wish to sponsor a showing of one or more of the films, appellee commissioned and introduced into the record a public attitude survey designed and interpreted by California's leading opinion sampling expert, Mervin Field, and administered by the Gallup Organization, on the public's reaction to a legislative candidate who would exhibit foreign films classified by the Justice Department as political propaganda. The reaction was overwhelmingly negative, on a par with that caused by a candidate lying about his academic credentials or concealing a juvenile commitment for robbery.³³ These results are fully applicable to appellee's senatorial district.³⁴

The Government's answer to the clear demonstration of the threatened adverse impact upon appellee's electoral standing—a public official's most valuable professional asset—is to insist that any such reaction is unintended by it and the result of the independent "subjective reaction of third parties," presumably the

³⁰ Petersen Declaration (J.A. 39); Conference Report on A.B. 406 (J.A. 112)

³¹ As the district court recognized, *Keen v. Meese* (J.S. 15a), appellee has not argued that an injury to his reputation caused by state action is itself a constitutional violation; rather, it is the means by which he is deterred from, or penalized by the exercise of, his constitutional right to free expression.

³² Declaration of Harry Bistrin (J.A. 29-30).

³³ Wood Declaration (J.A. 78).

³⁴ Field Declaration (J.A. 69).

voters. But as the court in *Block* correctly pointed out, it was this very "subjective reaction" of the people of Alabama to membership in the NAACP which this Court recognized, *NAACP v. Alabama, supra*, could dissuade persons from joining that organization if it was required by law to release its membership list. The Government concedes that one need not be subject to a direct governmental sanction or threat of same before one can suffer injury to one's right of self-expression. (Brief for Appellant 31).³⁵

Appellee's political opponents are free to attack him by any means, fair or foul, during the give and take of an election campaign—they may even attack his show of support for the Canadian films as the acts of a foreign propagandist and the films themselves as foreign political propaganda. The Government, however, is constrained by the First Amendment from launching such an attack, whether on plaintiff or anyone else, under the guise of administering the laws of the United States.³⁶

³⁵ An additional burden is imposed by the delay entailed in the administration of FARA's "political propaganda" requirements as applied to the films in this case. The record shows that NFBC submits titles of all its new films for review by the Registration Unit of the Justice Department, and indicates that in this case the list of 62 films was submitted in June 1982, while the Unit's determination about the three films was not announced to NFBC until Jan. 13, 1983. J.S. App. 5a, 48a; J.A. 24, 57; *Block v. Meese*, 793 F.2d at 1307. In view of the criminal penalties of the Act (22 U.S.C. 618 (a), (b)), it is fair to infer that the films were not disseminated during this period, at least not after the Department requested copies of them on Sept. 22, 1982 (J.A. 24). Delays on dissemination imposed by such a system of prior administrative review of core political speech surely offend the First Amendment. *Freedman v. Mayland*, 380 U.S. 51 (1965). In any event, there is no room under the First Amendment for administrative functionaries to be sitting in judgment on the content of protected expression. See, e.g. J.A. 63 (film "Crime and Punishment" deemed "political propaganda.")

³⁶ The distinction between regulatory action pursuant to statute and the examples of "government speech" listed by *amicus* Washington Legal Foundation and the court in *Block v. Meese, supra*, at 1313, is both obvious and substantial. Appellee endorses the reasons for rejecting the suggestion that this Court transform the issues presented here into a theoretical discourse on the limits of government expression, as set forth

The Government, or the Administration, may itself wish to sway members of the public who may see the films by impeaching the films with reference to their source. It is free to try and make its case. The Government may not, however, use the neutral machinery of law enforcement to officially characterize a particular expression of ideas with which it disagrees as untrustworthy, even subversive, and then, in effect, to dare appellee and anyone else to use that expository material at his own risk. That is not debate. That is abuse of power.

C. The Congressional Intent Underlying the FARA as a Whole, and § 4 in Particular, Was to Suppress Undesirable Political Speech.

1. Introduction.

The district court examined twice the legislative history of the FARA before concluding that Congress "did, in fact, intend to denigrate the affected materials" (*Keene v. Smith*, J.S. 60a) "in order to suppress or restrict that which it found abhorrent." (*Keene v. Messe*, J.S. 25a). A thorough reading of the record documenting Congress' consideration of FARA legislation and the problem to which the Act was addressed amply supports the court's conclusion.

The Government insists that the court was incorrect (Brief for Appellants, at 20-26), but that even if Congress had intended to suppress FARA-regulated speech, it was entitled to do so so long as it did not thereby "take concrete action to impair or discourage its dissemination," (Brief for Appellants 36) but instead merely "state[s] an official view that such, material . . . should be viewed with scepticism." *Id.*

The Government misses the point. In the first place, as the record in this case demonstrates, the action required of the Justice Department and registered agents—as well as appellee—in respect to the films is certainly concrete. Secondly, this case no more involves an "expression of views" than the Pure Food and Drug Act is the mere expression by Congress that dangerous

in the briefs of *amici* ACLU and the Freedom to read Foundation. To characterize this line of argument as strained is an understatement.

drugs and impure foods are a menace to public health. Like the latter Act, the FARA was enacted to solve a problem Congress had identified. Congress' intent in enacting the FARA is thus relevant to the question of the kind and magnitude of the federal interest Congress was attempting to further. As the record demonstrates, FARA was enacted to suppress pernicious doctrine; Congress chose as its method the classification and labeling scheme at issue here.

2. 1934 through 1939

Even though FARA as first enacted did not include §§ 1 and 4, understanding their purpose necessarily requires a review of the early origins of the Act, as Congress' threshold concern was with the effect on the domestic political process of the propaganda activities which it suspected were being carried out on behalf of Nazi Germany and the Soviet Union.

As the direct result of that concern, in 1934 the House of Representatives authorized the formation of a special committee to investigate:

(1) the extent, character, and object of Nazi propaganda activities in the United States; (2) the dissemination within the United States of subversive propaganda controlled by foreign countries, attacking the American form of government, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.³⁷

Denominated the Special Committee on Un-American Activities and known generally as the House Un-American Activities Committee ("HUAC"), it conducted seven public hearings and twenty-four executive sessions during 1934. Its efforts culminated in the Report of the Special Committee on Un-American Activities submitted to the House in 1935, summarizing the content of the 4320 page record it had amassed.

As set forth in the report, the committee, pursuant to its charge, had focused upon "the danger of vicious propaganda of foreign origin aimed at the subversion of those fundamental

³⁷ H.R. Res. 198, 73d Cong., 2d Sess., 78 Cong. Rec. 13(1934).

principles upon which our Constitution rests." Toward that end the committee had investigated "the extent and origin of such propaganda, with the ultimate object of protecting this country and its people from its dissemination."³⁸

What the committee feared most was propaganda spread ostensibly by Americans, but contrived and controlled by governments opposed to the United States. Accordingly, twenty of the report's twenty-four pages summarized the committee's investigation of fascist and communist activities, especially those connected in some way to the National Socialist (Nazi) Party in Germany, or the American Communist Party, the latter being assumed to have been directed from abroad.

In the committee's view the government had a duty actively to thwart "the illegal actions and methods of such movements, without regard to the improbability of attainment."³⁹ The "method" with which it was most concerned was the domestic dissemination of propaganda on behalf of foreign governments, whether fascist or communist inspired, both being "equally dangerous, equally alien and equally unacceptable to American institutions."⁴⁰

The report recommended six countermeasures for dealing with the danger posed by foreign propaganda. One became the nucleus of the FARA—that "all publicity, propaganda, or public-relations agents or other agents or agencies, who represent in this country any foreign government or a foreign political party or foreign industrial or commercial organization⁴¹ be required to register with the government.

The committee did not anywhere in the report suggest that it understood its target group of potential registrants to be anything other than those it believed to be propagandists.

³⁸ H.R. Rep. No. 153, 74th Cong., 1st Sess. 2 (1935).

³⁹ *Id.*, 20-21.

⁴⁰ *Id.*, 23.

⁴¹ *Id.*, 23.

The 1938 Act⁴² was clearly intended to address HUAC's concern with the "many persons in the United States representing foreign governments or foreign political groups, who are supplied by such foreign agencies with funds and other materials to foster un-American activities, and to influence the external and internal policies of this country, thereby violating both the letter and the spirit of international law, as well as the democratic basis of our own American institutions of government."⁴³

The ostensible purpose of registration was prophylactic, to publicize the activities of foreign propagandists so that the American people would know whose views were being promoted.⁴⁴ Registration was required "whenever representatives are sent here to spread by word or [sic] mouth, or by the written word, the ideology, the principle, and the practices of other forms of government and the things for which they stand."⁴⁵

Thus, the Act was aimed expressly at controlling those activities undertaken by the agent in furtherance of a scheme to "foster un-American activities and influence the internal and external policies" of the United States, the nearest statement to a definition of propaganda found in the committee reports in the 1938 Act.

⁴² Act of June 8, 1938, ch. 327, 52 Stat. 631 (1938) [hereinafter cited as "1938 Act"]. It is clear from the House and Senate reports that the bill was hardly amended by either the House Judiciary Committee or the Senate Foreign Relations Committee. See H.R. Rep. No. 1381, 75th Cong., 1st Sess. (1937); S. Rep. No. 1783, 75th Cong., 3d Sess. (1938).

⁴³ H.R. Rep. No. 1381, 75th Cong., 1st Sess. 1-2 (emphasis added).

⁴⁴ The report noted that "[o]ur National Food and Drug Act requires the proper labeling of various articles, and safeguards the American public in the field of health. This bill seeks only to do the same thing in a different field, that of political propaganda." H.R. Rep. No. 1381, *supra*, at 3. Secrecy being essential to the success of these activities, it was suggested that "the spotlight of pitiless publicity will serve as a deterrent to the spread of pernicious propaganda." *Id.*, at 2.

⁴⁵ H.R. Rep. No. 1381, 75th Cong., 1st Sess. 2 (1937).

In 1939, clarifying amendments were adopted⁴⁶ at the request of the State Department. In addition to the largely technical amendments, the Secretary asked for and received the authority "to withdraw from the public records the registration statement of any person whose activities have ceased to be of a character which requires registration under the terms of this Act."⁴⁷ Since under the 1938 Act any registration statement would forever remain a matter of public record, that "would seem to impose undue hardship upon those persons who, subsequent to their registration, become desirous of terminating their relationship as agent for a foreign principal."⁴⁸

While this language suggests that the government wished to encourage the termination of such relationships, it also underscores a social reality as obvious in 1939 as it is today—becoming publicly identified with foreign political propaganda efforts may indeed tend to impose "undue hardship" upon American citizens who in fact do not engage in such activity, directly resulting from an unsavory implication that one is not acting in the interests of one's own country.

⁴⁶ Act of August 7, 1939, ch. 521, 53 Stat. 1244 (1939) [hereinafter "1939 Act"]. The definition of "foreign principal" was broadened to include a domestic organization "subsidized, directly or indirectly, in whole or in part," by a foreign principal," (Id., § 1(d)). The definition of "agent of a foreign principal" was broadened to include "any person who receives compensation from or is under the direction of a foreign principal." Id., § 1(d). Also broadened were the exemptions. Persons engaged in religious, scholastic or scientific pursuits were explicitly exempted from having to register. Id., § 1(d)(5).

⁴⁷ 1939 Act, § 4.

⁴⁸ H.R. REP. NO. 711, 76th Cong., 1st Sess. 3 (1939) [letter from Secretary of State Cordell Hull to the House Judiciary Committee]. The House report notes that "[t]his would not have the effect of withdrawing the registration, nor of removing the papers from the State Department. It would only authorize the Secretary of State, if he sees fit to do so, to relieve persons who have ceased activities for a foreign principal of some embarrassment." H.R. REP. NO. 711, 76th Cong., 1st Sess. 2 (1939)

3. 1940 through 1945

In 1942, the FARA was revised⁴⁹ at the behest of the Department of Justice, which that year replaced the Department of State as the enforcement agency. The pertinent substantive change was the addition of the definition of propaganda,⁵⁰ and the review, classification, labeling and dissemination reporting requirements,⁵¹ in substantially the identical form in which they appear in exiting law.

An earlier attempt at revision, H.R. 6045, was introduced in November, 1941, followed by hearings;⁵² Congress thereafter passed another bill—H.R. 6269⁵³—which President Franklin Delano Roosevelt vetoed in February 1942 because of concern over its possible effect on the war effort.⁵⁴

According to the president's veto message, H.R. 6269's new provisions mandating the submittal of communications for review and classification as propaganda under the Act, followed, where appropriate, by labeling and reports on dissemination, in addition to the greater detail required when registering and in activity reports, "would . . . in many instances be unnecessary, inappropri-

⁴⁹ Act of Apr. 29, 1942, ch. 263, § 1, 56 Stat. 248 (1942).

⁵⁰ § 1(j).

⁵¹ § 4.

⁵² *Amending Act Requiring Registration of Foreign Agents: Hearing on H.R. 6045 Before Subcomm. No. 4 of the House Comm. on the Judiciary, 77th Cong., 1st Sess. (1941)* [hereinafter "1941 Hearings"]

⁵³ See H.R. REP. NO. 1547, 77th Cong., 1st Sess. (1941). At roughly the same time S. 2060 was making its way through the Senate. It was essentially the same bill. See S. REP. NO. 913, 77th Cong., 1st Sess. (1941). However, there were floor amendments in the House introduced by Rep. Dies explicitly singling out certain organizations in the definition of "person" and "agent of a foreign principal," necessitating a conference committee. After a good deal of debate, the House eventually brought the bill back into line with the Senate version.

⁵⁴ H.R. DOC. 611, 77th Cong., 2d Sess. 2 (1942) (veto message from F.D.R.).

ate, and onerous in respect to the representatives of friendly nations who are constantly coming to and from the United States to cooperate with us."⁵⁵

Congress quickly passed a new bill, S. 2399, to accommodate the President's concern, and that bill was duly signed into law. An exemption for agents of friendly governments was included.⁵⁶

The stated rationale for the 1942 revision was to strengthen FARA, the government's "chief instrument for controlling foreign agent activity in the theater of political propaganda and in kindred fields of activity."⁵⁷ The Justice Department viewed FARA as a "fairly successful medium of control," that could be "even more effective and valuable."⁵⁸

The Department of Justice was made the enforcing agency because State had no "effective way of finding out whether a foreign propaganda office is secretly operating[.]"⁵⁹ The underlying reason⁶⁰ for the transfer was to link FARA with the Voorhis

⁵⁵ H.R. Rep. 2038, 77th Cong., 2d Sess. 1-2 (1942) (Presidential Veto Message).

⁵⁶ Under the exemption, agents of a friendly government were subject to less burdensome regulation. They did not have to file a registration statement. Their principal was instead required to provide the Attorney General with information about the agents' identity and activities. Speech in written form did not have to be filed for content review if it were disseminated among fewer than 20 members of the public; dissemination reports could be filed at monthly intervals. The Attorney General was given the authority to waive even these lesser requirements. *Report of the Attorney General to the Congress of the United States on the Administration of the Foreign Agents Registration Act of 1938*, 16 (1945) [hereinafter "Report"].

⁵⁷ 1941 Hearings, 24.

⁵⁸ *Id.*

⁵⁹ 1941 Hearings, 28.

⁶⁰ 1941 Hearings, 17.

Act,⁶¹ which covered domestic organizations engaged in subversive activity. The Department wished to integrate the enforcement of the two programs, since both sought "to secure disclosure by registration from those who, under foreign control, act to influence the public."⁶²

The Department of Justice also sought by the 1942 Act to directly counter secret propaganda efforts "in view of the increased attempts by foreign agents at the systematic manipulation of mass attitudes on national and international questions, by adding requirements to keep our Government and people informed of the nature, source, and extent of political propaganda distributed in the United States."⁶³

Accordingly, FARA was amended to provide for the filing, review, classification and labeling of foreign "political propaganda," and the reporting by the agent of the domestic dissemination thereof, the provisions at issue in this case.

Beyond question, Congress and the Administration perceived political propaganda as integral to a systematic, highly sophisticated and well-concealed attempt by totalitarian governments to infiltrate American institutions and society. It is thus simplistic to characterize the FARA provisions held invalid by the district court as an attempt merely to provide the government and public with the means to "'appraise [foreign agents'] statements . . . in light of their associations and activities.'" (Brief for Appellants 22, quoting FARA § 1 note). As noted accurately by the district court, "sunshine" is used as an "antidote to that which is evil or injurious." (*Keene v. Meese*, J.S. at 25a). Congress' description of foreign agents' speech as "political propaganda" reflected Congresses belief that the unchecked proliferation of such speech was dangerous. The FARA was intended to stop its spread.

⁶¹ Act of October 17, 1940, ch. 897, 54 Stat. 1201 (1940). Also known as the Alien Registration Act, it has been referred to as "the first national peacetime sedition law since the alien and Sedition Acts of 1798." See McCloskey, *The Modern Supreme Court* 44 (1972).

⁶² 1941 Hearings, 26.

⁶³ *Id.*, 25.

During the congressional hearings on the first FARA bill to be introduced in 1941, held just prior to the Japanese attack on Pearl Harbor, the committee focused on the types⁶⁴ and content of Axis propaganda. German and Italian propaganda was described as featuring the principal themes of anti-semitism, Nazi ideology, British imperialism, German and Italian might, and the belligerence of President Roosevelt. Japanese propaganda was said to stress Japan's right to economic self-sufficiency, its goal of a new order in Asia, the reasonableness of its actions in Manchuria, and the superiority of Japanese civilization. Japan's propaganda efforts were said to differ from the other Axis powers in their "purposive vagueness and contradictions" and greater focus on "esthetic and cultural matters to attract American sympathy for Japan's motives and character."⁶⁵

Common to each, however, was that their communications on these matters were "colored and twisted to present solely one point of view."⁶⁶

The State Department described the problem as "enormous," having "grown, rather than lessened" since the 1938 Act, political propaganda having become "more scientific" and "frequently better concealed."⁶⁷ Like Justice and Congress, State feared most of all the effect Axis propaganda might have on American resolve in the event it became necessary to enter the wars in Europe and Asia:

The handling of foreign propaganda is now a recognized part of the machinery of making war and is perhaps at its most acute in that debatable period when it is not clear what the

⁶⁴ About half of the Axis propaganda from abroad consisted of books and pamphlets; the other half, periodicals. 1941 Hearings, 21.

⁶⁵ *Id.*, 22. According to a spokesman for the Department of Justice, dissemination of propaganda was widespread, with about 700,000 recipients in the country. An example of how propaganda was spread was by the insertion of leaflets marked with the notation, "Please pass me along," in issues of "Life" magazine.

⁶⁶ *Id.*, 13.

⁶⁷ *Id.*, 30.

intentions of another country may be. That is the time when the technique of infiltration, of propaganda, of internal organization in another country—all these processes go on.⁶⁸

Yet when pressed to quantify the extent of the problem, the Department's spokesman replied "[y]ou can only give a very general impression because that kind of propaganda does not advertise itself."⁶⁹

In the months following America's declaration of war on the Axis countries, however, Congress was in no mood to wait for more definitive information to be compiled.⁷⁰ Thus, Rep. McLaughlin began his floor remarks on S. 2399 as follows:

Propaganda has for many years been recognized as one of the most powerful weapons on earth. In very recent years its tremendous influence has come to be more and more clearly recognized. . . . Our particular attention has been directed to the deadly effects of propaganda in the countries of Europe, and to the effects sought to be produced in the Latin and South Americas in our own hemisphere.⁷¹

In response to the concern expressed by some legislators as to whether the FARA propaganda regulations might be a form of censorship, the standard response was to portray the filing and labeling requirements as compatible with the original legislative scheme. So, for instance, FARA does not

dictate to you what you can say, which would be an interference with freedom of speech. If it said you shall not say certain things, that would be one thing; but it merely provides that before you say certain things you shall disclose

⁶⁸ *Id.*, 29.

⁶⁹ *Id.*, 29-30.

⁷⁰ Congressmen were more likely to be concerned about Communist as well as Axis propaganda than was the case during the days of the HUAC hearings.

⁷¹ 87 CONG. REC. 10051 (1941).

who you are and who is paying you. I believe that comes within the cases.⁷²

But disclosure and suppression are not mutually exclusive. A close reading of the legislative history reveals that disclosure was not the ultimate goal; rather, it was the means to accomplish at least two ends considered desirable by FARA's sponsors.

First, disclosure provided a way to monitor foreign agent activities, which would be useful if a more direct method of suppression became necessary. Second, as a method of reducing the amount of propaganda available domestically and diminishing its impact, disclosure was seen as

more effective than suppressive acts. From the point of view of prosecution it is easier, very often, to prosecute for failure to tell the truth than it is to prove that some person was engaged in advocating the overthrow of the Government by force and violence. [S]econdly . . . these bad political organizations cannot survive in the pitiless light of publicity.⁷³

Thus, registration, content classification and labeling, and activity reports were intended as weapons to be used in an anticipated battle for the hearts and minds of the American people. Violations of those technical requirements created the opportunity to prosecute the foreign agent who could not easily be reached by anti-sedition laws. Classifying as propaganda and further burdening with additional regulation the speech of those agents who complied with the Act was meant to stem its dissemination and truncate its power to persuade.

The label the agent was to affix to regulated material was required to be in the language or languages of the propaganda itself, and was to inform the recipient of the distributor's status as a registered agent of a foreign principal; his name and address; the name and address of each of his foreign principals; that his registration statement, open to public examination, was on file with the Justice Department; and that registration under the Act

⁷² Id., 19.

⁷³ Id., 20.

did not indicate U.S. government approval of the contents of the material.⁷⁴

"Political propaganda" was—and remains—defined in terms of the material's capacity to "in any [] way influence a recipient or any section of the public within the United States" with reference to furthering the interests of a foreign government, influencing American foreign policy, or creating racial, religious, or social dissension.⁷⁵

While it was conceded that "the definition . . . is fairly broad," this was considered permissible because "it affects only those persons who have to register as agents of a foreign principal."⁷⁶ It was pointed out that simply distributing political propaganda would not require a person to register. "But once they are registered agents and have been compelled to register, then we want to get a fairly broad coverage of the type of material that they distribute."⁷⁷

⁷⁴ The following is an example of a label used by registrants not covered by the friendly government exemption:

"Copies of this release have been filed with the United States Department of Justice, Washington, D.C., where the registration statement of the Swiss Federal Railroads (Official Information Bureau of Switzerland), an agency of the Swiss Government, is available for public inspection. The fact that a registration statement has been filed should not be considered as approval by the United States Government of the contents of this publication."

Allied government agents used, for example, the following labels:

"British Information Service, an Agency of the British Government."
"The French Press and Information Service, an Agency of the Provisional Government of the French Republic." Report 21-22.

⁷⁵ The definition also included materials relating to the forcible overthrow of other American republics.

⁷⁶ 1941 Hearings, 11.

⁷⁷ Id., 18. The answer was in response to Rep. Hancock's question about "whether the language is so broad that we might have a certain amount of sensitivity among the members of the Democratic and Republican Parties." Id.

Nowhere in the record of Congress' deliberations upon the propaganda provisions does it appear that Congress considered the effect of treating a particular communication as foreign political propaganda on American citizens who wished to use the material for their own purposes. The record is replete with references to the assumption that propaganda regulation would benefit recipients, *i.e.*, those whom the agent hoped to influence, by requiring disclosure of the agent's connection to its principal. The only speakers Congress appeared to have recognized as potentially affected by the legislation were the propagandists, their agents, or perhaps their dupes.

That an American citizen might find a particular expression of information or opinion by a registered agent of sufficient interest or merit to serve as an expression of his own views, without regard to the motives or identity of the speech's source, seems not to have occurred to anyone in either Congress or the Administration during this period. It was simply inconceivable that anyone other than a dupe or a knave could sincerely agree with the "colored and twisted" point of view of America's enemies, much less be inclined to proselytize for them. And in any event, the threat of the unregulated spread of such material was thought too great for Congress to have been deterred by such considerations.

While there were certainly many comments from FARA's proponents in Congress about the need to protect the public from being deceived as to the foreign source of political speech—the Pure Food and Drug Act analogy—as the discussion above demonstrates, disclosure was not really intended for the public, a fact underscored recently by the Government's interpretation of the FARA as allowing recipients to remove the disclosure label (J.S. App. 54-55a); instead, disclosure was intended as a means of controlling propaganda activity.

To the extent that the Act required disclosure, it did so with an eye toward suppression. The strategy was to make attempts by foreign agents to garner public support for their principals unlawful unless they complied with the FARA. On the one hand, the Act imposed considerable burdens upon such activities, making them more difficult while reducing their effectiveness. Congress and the Administration recognized that there was a stigma

attached to being known as a foreign agent, that the credibility of an agent's speech was impugned by its official characterization as foreign "political propaganda," an effect reinforced by the attached disclosure statement, all of which was intended to deter the dissemination of political propaganda. On the other hand, it was anticipated that hard-core foreign agents would not comply, leaving themselves vulnerable to prosecution.

A more apt analogy to another set of federal drug laws would better describe the FARA's regulatory scheme. Like the marijuana tax stamp laws, FARA's disclosure requirements are intended to burden disapproved behavior so as both to discourage it and penalize those who try and avoid the burden of compliance. Unlike the expression of political speech, however, the importation of controlled substances and their domestic distribution is not protected from government interference by the First Amendment.

Periodic reports to Congress from the Attorney General provide some further insights into the FARA's purpose. The first such report, published in 1945, covers the period from September 8, 1938 to December 28, 1944. It describes the history, scope, disclosure procedures and enforcement of the Act, and includes a list of administrative regulations promulgated by the Department.⁷⁸

FARA proved remarkably successful in preventing the former while suppressing the latter. Attorney General Francis Biddle reported that since FARA enforcement responsibility was transferred to the Justice Department, "propaganda activities of agents of the Axis countries were largely eliminated" by wartime security measures. Quite a few aliens were deported as the result of having violated the Act, nearly all of whom were from Axis countries.

⁷⁸ Most of the report consists of summaries. It lists all of the registrations filed between September 8, 1938 and December 31, 1944. There are more 300 pages of abstracts of registration statements on file from June 28, 1942 (when transferred to Justice) through December 31, 1944.

Prosecutions under FARA and the Espionage Act of 1917,⁷⁹ through 1945 resulted in the conviction of 81 defendants in 40 cases.⁸⁰

The report also discussed the nature and content of propaganda filed under the Act. As early as 1945, the distinction between "political propagands" and other types of informational, and even entertainment activities had begun to blur. In fact, as the consequence of "substantial refinement in techniques," it happened that "in a number of reported instances, books, motion pictures, and radio broadcast of foreign governments have attained sufficient literary value, to be commercially profitable ventures in the American market."⁸¹

FARA was also used during this period by the Postmaster General, working with Customs as early as 1939, to screen mail from abroad and seize that which was determined to fall within the scope of the FARA but either did not carry the required disclosure label or had been sent by a person or entity who would have been required to register as an agent if located within the United States.⁸² Seized material was not delivered to its addressees.

⁷⁹ Also known as the Notification Act, it among other things required any agent of a foreign government to file a notification with the State Department. The Attorney General explained that "in a considerable number of cases compliance with each statute is necessary. Where this is true . . . non-compliance with the one usually extends to both, so that prosecution under either or both Acts has been feasible." Report, 34-35.

⁸⁰ Of the 81 defendants, 58 were agents of German, 10 of Japanese, and 3 of Italian principals. The other 10 had Soviet, Spanish, Swedish, and Finnish principals. Report, 35.

⁸¹ Report, 33.

⁸² The program continued well into the fifties. As much as 56,500 pieces of foreign propaganda material were reported to the Post Office by local officials in one month. Note, 1393, n.2. During this period FARA was closely linked to general internal security programs aimed at combating Communist propaganda. Note, 1393, n.1.

D. A Legislative Purpose to Inhibit, Suppress or Burden Speech on the Basis of its Content is *Per Se* Illegitimate, Barred by the First Amendment

It can hardly be gainsaid that a legislative purpose to restrict political speech on the basis of content, by whatever means, is *per se* illegitimate and cannot pass muster as even a proper legislative function, much less as a substantial state interest, absent the most extraordinary circumstances. *First Nat'l Bank v. Bellotti*, 435 U.S. at 783; *Buckley v. Valeo*, 424 U.S. at 25; *Con. Edison v. Public Serv. Comm.*, 447 U.S. at 540; Cf. *Near v. Minnesota*, 283 U.S. 697 (1931).

1. The Government's Interest in Compelling Disclosure of the Source of Foreign Speech Is Not Sufficient, And In Any Event Does Not Require Branding Speech as "Propaganda"

The only arguably legitimate purpose the Government advances for FARA's "political propaganda" requirements is disclosure of the source of materials disseminated by foreign agents. The Government's position, however, is that the recipient of the material may remove the label. As the district court pointed out, "the chief importance of the labelling requirement is obviously to inform viewers of the origins of the film," and hence the Government's position means that exhibitors "may, with impunity, frustrate Congressional intent" (J.S. App. 55a). Thus, the usefulness of the labelling requirement is reduced to those random cases in which the recipient finds it too difficult or burdensome to have the label removed.

In any event, the asserted interest in source disclosure does not require branding the material as "propaganda." The political propaganda terminology serves no legitimate purpose whatever and thus hardly can be said to be language that was narrowly crafted to accomplish the stated goal, *First Nat'l Bank v. Bellotti*, 435 U.S. at 786, even if the goal were merely source disclosure rather than suppression.

2. To Require Source Disclosure Only of Political Speech from Foreign Sources Constitutes Impermissible Content Discrimination

A source-disclosure requirement applied to political speech within the United States is impermissible when it discriminates on the basis of content, applying only to "information of foreign origin" on the assumption that it is less likely to come from a "disinterested source." *Viereck v. United States*, 318 U.S. at 251 (Black, J., dissenting). That may have been an understandable position for Congress and even a member of this Court to take in 1942, but it cannot stand today. *Police Department v. Mosely*, 408 U.S. at 95-96; *First National Bank of Boston v. Bellotti*, 435 U.S. at 777; *FCC v. League of Women Voters*, ____ U.S. at ____ [104 S.Ct. at 3120]; *Pacific Gas & Electric Co. v. Public Utility Commission*, 106 S.Ct. at 907 (opinion of Powell, J.). In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court upheld a law requiring disclosure of the names of contributors to political campaigns, but only after recognizing that "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights" (*id.* at 66) and therefore "must survive exacting scrutiny" (*id.* at 64). The Court there found three categories of governmental interests to be, in combination, sufficient to sustain the disclosure requirement, though not necessarily with respect to minor parties and independent candidates (*id.* at 66-84). Only one of the three categories was that of providing the electorate with information (*id.* at 66); the disclosure requirements were found also to deter corruption and to be an "essential means" of gathering data to detect violations of the Act's contribution limitations (*id.* at 66-68).

The requirements of FARA at issue in this case require disclosure, not of the names of persons contributing money, but simply of speakers—of the sources of political speech. Thus they can claim no substantial justification in the interests of deterring corruption or enforcing other legal requirements. Moreover, they apply only to political speech from *foreign* sources, thus discriminating on the basis of speakers and, because of the nature of international political issues, on the basis of point of view as well. FARA's disclosure requirements for foreign-source speech alone

would offend the First Amendment even if they did not stigmatize that speech as "propaganda." FARA's regulation, under the "propaganda" rubric, of political speech from foreign sources, based as it is on the assumption that such speech is less trustworthy than domestic speech, constitutes a relic of wartime—and of a far less powerful nation—that happily has no place in contemporary America.

CONCLUSION

For all the reasons stated herein, the judgment below should be affirmed.

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REPLY

BRIEF

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In the Supreme Court of the United States
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EDWIN MEESE, III, ATTORNEY GENERAL OF THE
UNITED STATES, AND JOSEPH E. CLARKSON,
APPELLANTS

v.

BARRY KEENE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE APPELLANTS

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1180

EDWIN MEESE, III, ATTORNEY GENERAL OF THE
UNITED STATES, AND JOSEPH E. CLARKSON,
APPELLANTS

v.

BARRY KEENE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE APPELLANTS

As is apparent from the opinion of district court, this case concerns the power of Congress to utilize particular terminology in enacting legislation. In this case, the district court found unconstitutional the use of the term "political propaganda" in the sections of the Foreign Agents Registration Act of 1938 (FARA), 22 U.S.C. 611-621, requiring that agents of foreign entities distributing items of political advocacy register and provide certain information to the Attorney General, and attach to the material a disclosure statement setting forth the source and certain other information.

1. As we argued in our opening brief, a person such as the appellee, who has no obligations under the Act and whose only connection with it arises from his desire to use material to which it has been found to apply, does not raise a justiciable claim simply by alleging injury from Congress's choice of words. Appellee does not argue, as the district court concluded, that he has standing to challenge the use of the term "political propaganda" because it amounts to a form of censorship and he is one "whose expression has been censored" (J.S. App. 10a). He does contend, however, that Congress's use of the term "political propaganda" is likely to injure his reputation, and further that he will be injured by the labeling and reporting requirements of the Act.

a. In supporting his claim to standing, appellee asserts that his personal and professional reputation—as an attorney and a legislator—will be significantly impaired if he shows films that have been classified by the government as political propaganda. Where as here the asserted constitutional defect is not in what is being required by the legislation, but in the words chosen by Congress in articulating the legislative scheme, the "single basic idea" behind Article III standing—"the idea of separation of powers" (*Allen v. Wright*, 468 U.S. 737, 752 (1984)) is implicated in a special way. In this case, we submit that the claimed injuries to reputation are not fairly traceable to the government's choice of terminology, and that the remedy of invalidating use of the words "political propaganda" will not remedy the injury claimed. *Id.* at 753 n.19; *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41 (1976).

The failure to establish standing here on the basis of harm to reputation does not result, as appellee misstates our argument, from the fact that it depends on the reactions of third persons (Appellee's Br. 18 n.17). It rather results from the convoluted and uncertain chain of circumstances by which appellee's reputation as a lawyer and a legislator would arguably be affected, and the minimal role that the challenged language would play in bringing that about.

As we indicated in our opening brief, the statute's neutral definition of "political propaganda" means that any negative connotations drawn from the term are in spite of the express meaning that Congress gave to it (Appellants' Br. 15). They are, on that account, among others (see *ibid.*), rather unlikely. We suggest further that the concept of separation of powers must at least embody the power to define and use terminology in a neutral way, notwithstanding any connotations that may attach to it in another context.

Assuming, however, that citizens may sometimes bring suit to challenge the connotations of statutory language that Congress has explicitly abjured, there is further reason to doubt appellee's standing based on the particular injuries to reputation that he has asserted. For the primary injuries claimed are to his reputation as a legislator and an attorney (Appellee's Br. 16-17 n.15), and there is little reason to suppose that the mere enjoining of certain terminology would remedy the adverse effects that appellee says are likely to result from public awareness that he is displaying material found to trigger the FARA.

Appellee claims that his chances as a candidate for office will be adversely affected, that his ability to communicate his political views will be impaired,

and that his future employment in the legal profession will be disrupted (Appellee's Br. 16-17). To the extent that appellee is challenging the use of the words "political propaganda," it is difficult to imagine that similar consequences would not also result under a statute amended in the manner found constitutionally necessary by the district court. The mere substitution of words such as "political advocacy" would leave the full machinery of the statute in effect¹ and the public is likely to treat the materials covered by the Act in the same manner and with the same degree of skepticism that the public treats the materials now defined as "propaganda" (see *Block v. Meese*, 793 F.2d 1303, 1312 (D.C. Cir. 1986), cert. denied, No. 85-1837 (July 7, 1986) ("advocacy," if regularly applied to the same materials currently described as "propaganda," "would soon produce the same degree of skepticism that the word 'propaganda' currently evokes")). It would be surprising if reputational harm growing out of "resentment to foreign competition" or the presence within appellee's district "of large and important Naval and Air Force bases" (Appellee's Br. 16-17) were to disappear when the same films subject to the same registration and disclosure requirements were shown after a change in terminology.

Thus even assuming that one may challenge legislation based on the connotations of words which Congress has fully defined, appellee has not shown that his injury stems primarily from the pejorative col-

¹ Appellee did not argue below for invalidation of any provision except the use of the term "political propaganda" (J.S. App. 29a-30a). The district court explicitly found that the operation of the statute as a whole, apart from that phrase, presented no First Amendment violation (J.S. App. 27a).

loquial understanding of the term "political propaganda" considered apart from the rest of the statutory scheme and that different terminology will not lead to the same public reaction.

b. In our opening brief we explained that appellee is a bystander to the FARA. Appellee is not a foreign agent and is not subject to any of the Act's labeling or reporting requirements or sanctions. The district court also found that "[appellee] is not * * * injured in any way whatsoever by the labeling requirement" of the FARA (J.S. App. 55a). Nonetheless, appellee contends (Br. 10-13) that he is injured by the labeling requirement in one of two ways: either he must "communicate a message with which he disagrees, a message that disparages his own message reflected in the film" (Appellee's Br. 10), or he must go to some "effort, expense, or delay" in order to delete the label from the film beforehand (*id.* at 12). These arguments do not materially enhance the standing argument focused narrowly on the effects of the words "political propaganda."

To a substantial extent, this argument is derivative of the primary standing claim of injury to reputation and is significant as one possible means by which the public might become aware of the classification of the films as political propaganda. Thus, if the Court finds the very attack upon the statute's terminology to be inherently non-justiciable or finds the injury to his reputation to be one that will not be remedied by the relief sought and granted, the labeling requirement adds nothing to that argument.

Insofar as the objection to labeling goes to the actual contents of the label and alleges compelled communication with which appellee disagrees, it is noteworthy that the label is entirely factual and does

not require appellee to endorse any viewpoint.² It does not even use the term "political propaganda," and thus would only make one aware that that term had been applied to the film who was familiar with the operation of the Act.

Also, as one with no obligations whatsoever under the Act, appellee is, of course, not required to label a film with the identification statement required of foreign agents, and is free to remove any label affixed by a foreign agent.³ Appellee may also exhibit the films without displaying the label, simply by advancing the film.⁴ There is no finding below, nor any allegation in appellee's complaint, that removing the

² The standard identification statement form used for films is reprinted in our opening brief (at 4-5) and in the Joint Appendix (at 16, 57, 59).

³ It is not clear from the record that the films that appellee showed contained the label. The district court did note that the films were obtained and exhibited by appellee after the district court entered a preliminary injunction on September 7, 1983, but did not indicate from whom they were received (J.S. App. 6a n.2).

⁴ Appellee, like the district court, finds it odd that the FARA grants him the freedom to remove the label that a foreign agent must affix to a film, and he claims that this feature of the Act is inconsistent with its stated purpose. Appellee's Br. 11; J.S. App. 55a n.2. Appellee has misunderstood the statutory scheme. Congress required that the public be made aware of a speaker's identity only when that party is a foreign agent; the labeling requirement therefore applies only when a foreign agent distributes political propaganda, as defined by the Act. Congress was not concerned with the political discourse of parties, such as appellee, who are not foreign agents. For that reason, Congress did not require such parties to include an identification statement in whatever films they choose to exhibit. Our construction of the Act's labeling requirements therefore hardly eviscerates Congress's intent.

label or exhibiting a film without it burdens appellee in any significant way; he thus cannot establish standing on this ground (*Diamond v. Charles*, No. 84-1379 (Apr. 30, 1986), slip op. 12; *Bender v. Williamsport Area School District*, No. 84-773 (Mar. 25, 1986), slip op. 11-14; see *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 722-723 (1985)).

c. Appellee also contends (Br. 13-15) that he will be injured by the reporting provisions of the FARA and the implementing regulations, because a foreign agent is likely to list him on the standard reporting form as a recipient of a film the agent has distributed. Being listed on that form, appellee contends, will in turn injure him during a political campaign, if this fact is revealed by an opponent during its closing days.

Appellee has failed to show, however, that he has been or will be injured by the reporting provisions of the FARA. His complaint does not allege that the NFBC-NY or any other foreign agent has listed him as a recipient of the films in dispute (J.A. 45-51). Appellee obtained the films more than three years ago (*id.* at 110), and the FARA and its implementing regulations require a foreign agent to file a dissemination report with the Department of Justice within 48 hours of the distribution of materials covered by the Act, or, in some circumstances, on a monthly basis (see 22 U.S.C. 614(a); 28 C.F.R. 5.401(c) and (d)).

Even assuming that appellee obtained the three films from the NFBC-NY, which he has not alleged, there is no basis for concluding that the NFBC-NY will list him on a future dissemination report. The reporting form does not require and provides no place for appellee to be listed as a recipient of any such

films, because he is not a "station, organization, or theater" (J.A. 17). Appellee asserts (Br. 14) that he could be identified on a dissemination report as a "public official," but the form only requests and allows space for the *number* of public officials who have received materials covered by the FARA, not their identity (J.A. 17). Moreover, appellee has not alleged that he will exhibit other films distributed by the NFBC-NY or by another foreign agent. Accordingly, appellee's claim that he will be injured by the Act's reporting requirement is insufficient to establish his standing. See *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 67-69 (1974) (the fact that a person is a bank depositor does not give him standing to challenge bank reporting regulations applicable only to limited types of transactions).

2. a. Appellee (Br. 20-23) and amici (ACLU et al. Br. 13-27; Playboy Enterprises, Inc., et al. Br. 5-6; Freedom To Read Foundation Br. 15-17) claim that the term "political propaganda" regulates political speech on the basis of its content. That claim is flawed. To the extent that appellee claims that Congress can never adopt a disclosure statute applicable only to particular types of speech, his claim is foreclosed by *United States v. Harris*, 347 U.S. 145 (1954) (upholding Federal Regulation of Lobbying Act, 2 U.S.C. 261-270), and *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding contribution disclosure requirements of Federal Election Campaign Act of 1971). To the extent that appellee claims that Congress has sought to discriminate among different types of political speech on the basis of viewpoint, appellee has misunderstood the statutory scheme. More generally, the FARA and its definition of "political propaganda" are completely consistent with the Court's definition of "content-neutral" speech

regulations: namely, "those that 'are justified without reference to the content of the regulated speech'" (*City of Renton v. Playtime Theatres, Inc.*, No. 84-1360 (Feb. 25, 1986), slip op. 6 (emphasis in original), quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

The text of the FARA clearly states that its purpose is to inform the public of foreign efforts to influence domestic political debate in order to protect the nation's vital interests (22 U.S.C. 611 note (congressional statement of the purposes); *Viereck v. the nation's vital interests* (22 U.S.C. 611 note (con-
United States, 318 U.S. 236, 241 (1943))), and the legislative history of the Act amply proves that Congress meant what it said (Appellants' Br. 23-27).⁵ The statutory definition of "political propaganda" implements this goal. The definition is wholly neutral and includes "all communications issued by foreign agents, whether friendly or unfriendly, whether violent or mild" (*Block v. Meese*, 793 F.2d at 1310 (quoting *United States v. Kelly*, 51 F. Supp. 362, 363 (D.D.C. 1943))). The all-inclusive definition of "political propaganda," coupled with the purpose of the Act, shows that Congress has not violated its "paramount obligation of neutrality in its regulation of

⁵ Appellee argues (Br. 32-46) that Congress deliberately chose this term to suppress disfavored speech. That claim misconstrues the legislative history of the Act. Moreover, appellee ignores both the text of the Act as well as the most recent amendments in 1966. In that year, Congress reiterated that the purpose of the FARA was only to disclose the identity of foreign agents, not to suppress their speech (Appellants' Br. 26-27 n.22). Thus, even if Congress had originally enacted the FARA in 1938 to suppress foreign political speech, Congress certainly made clear in 1966 that this is not the Act's purpose.

protected communication' " (*City of Renton v. Playtime Theatres, Inc.*, slip op. 7, quoting *Young v. Playtime Theatres, Inc.*, slip op. 7, quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion)).

To be sure, the definition is limited to speech by foreign agents designed to influence the Nation's foreign policies. To that extent, the FARA treats foreign political expression differently from domestic political debate. But Congress plainly had a rational and compelling basis for concern about foreign efforts to influence the domestic political debate during the period preceding our entry into World War II and during the war itself, and appellee has offered nothing to show that this concern lacks force today. The goal Congress sought to achieve through the Act—protecting the "national defense, internal security, and foreign relations" of the nation by ensuring that the public would be aware of the efforts of foreign agents to influence domestic political debate (22 U.S.C. 611 note)—is also "unrelated to the suppression of free expression" (*City of Renton v. Playtime Theatres, Inc.*, slip op. 6). The definition and the entire Act are concerned with where the material comes from, rather than with the content of the speech. Cf. *id.* at 5-6. Accordingly, the FARA, like the zoning ordinance at issue in *City of Renton v. Playtime Theatres, Inc.*, *supra*, does not violate "the fundamental principle that underlies [the Court's] concern about 'content-based' speech regulations: that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views' " (slip op. 7, quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972)).

b. Appellee (Br. 23-32) and amici (ACLU et al. Br. 15-27; Playboy Enterprises, Inc., et al. Br. 6-18; Freedom To Read Foundation Br. 9-17) contend that the FARA, by defining as "political propaganda" certain types of materials a person wishes to disseminate and endorse, indirectly restrains his freedom of speech.⁶ The Act achieves this goal, they argue, by impugning appellee's expression and subjecting him to official condemnation and public criticism by his constituents and the public in general.⁷

⁶ The very indirect character of the alleged restraint distinguishes this case from outright prohibitions on certain types of speech, such as those involved in *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (provision of Public Broadcasting Act forbidding grantees of money from Corporation for Public Broadcasting from engaging in editorializing found to violate First Amendment), *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980) (invalidating on First Amendment grounds an order prohibiting a public utility from including discussions of controversial issues with its billing statements), and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (state criminal statute prohibiting specified corporations from spending money to influence elections found to violate the First Amendment). Indeed, the Court in *League of Women Voters* suggested that the government could require public broadcasting stations to broadcast a disclaimer, much like the one required under the FARA, that the station's editorials do not represent the views of the government. 468 U.S. at 395.

This case is also readily distinguishable from those involving requirements that one assist in the dissemination of views with which one disagrees. *Pacific Gas & Electric Co. v. Public Util. Comm'n*, No. 84-1044 (Feb. 25, 1986) (public utility may not be compelled to include in billing envelopes statements of persons who disagree with its policies).

⁷ The asserted impugning effects resulting from the use in the Act of the words "political propaganda" bear no resemblance to the evidence of "threats, harassment, or

Appellee and amici contend in essence that a person wishing to engage in political speech is entitled under the First Amendment to be free from expressions by the government that in any way call his ideas into question. In fact, appellee argues that he is entitled to heightened First Amendment protection, since he is an elected official subject to disapproval by the electorate at the polls (Appellee's Br. 16-17).⁸

reprisals" which this Court has found sufficient to justify exemption from disclosure provisions of state or federal law. *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 93 (1982); *Buckley v. Valeo*, 424 U.S. 1, 74 (1976); *NAACP v. Alabama*, 357 U.S. 449, 462-463 (1958). There is likewise no comparison between the mere utilization of certain terminology in reference to certain First Amendment protected material, and explicit public disclosure requirements pertaining to identity and affiliation with an unpopular cause. Finally, the governmental interest in an informed public, able to assess foreign-source material in light of its origins, is certainly more urgent than the vaguely directed concerns which have guided some of the disclosure statutes that the Court has invalidated. See *Talley v. California*, 362 U.S. 60 (1960).

⁸ Appellee's claim that public officials are entitled to special protection by the First Amendment is inconsistent with well-settled principles of First Amendment law. Cf., e.g., *Philadelphia Newspapers, Inc. v. Hepps*, No. 84-1491 (Apr. 21, 1986), slip op. 7-8; *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government").

Appellee also suggests (Br. 31 n.35) that the FARA causes a delay in the dissemination of the materials covered by the Act, but that suggestion is plainly wrong. The FARA does not forbid a foreign agent from distributing such materials until the government reviews them. The Act and its implementing regulations only require that a foreign agent submit a copy of all such materials to the government within 48 hours after it has been distributed or, in some cases, on a monthly

Appellee and amici err in focusing on the definition of "political propaganda" in isolation from the remainder of the FARA. The Act sought to ensure that "hearers and readers may not be deceived by the belief that the information [disseminated by a foreign agent] comes from a disinterested source" (*Viereck*, 318 U.S. at 251 (Black & Douglas, JJ., dissenting)), a goal that even the district court found "consistent with the loftiest conceptions of the First Amendment" (J.S. App. 25a). Any sunshine law like the FARA will therefore lead certain members of the public to disbelieve or discredit the opinions of the persons whose identities are revealed. In the case of foreign efforts to influence domestic political debate, Congress made the judgment, and has adhered to that judgment for more than four decades, that the benefits to the public and the nation from disclosure of the identities of foreign agents outweighs any resulting burden on their ability to engage in speech. This Court has assumed that Congress's judgment is valid (see *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 99-100 (1961)), two Members of the Court have expressly so declared (*Viereck*, 318 U.S. at 251 (Black & Douglas, JJ., dissenting)), and

basis (22 U.S.C. 614(a); 28 C.F.R. 5.401(c) and (d)). In fact, in 1942, at the request of the Justice Department, Congress deleted a proposed amendment to the Act that would have required a foreign agent to submit a copy of such material to the Department before the material could be disseminated (Appellants' Br. 25 n.20). Any delay in the distribution of the films at issue in this case stems from the fact that the NFBC sought the Department's assistance in determining whether these films fit within the Act. The NFBC was at all times free to make this determination on its own and to distribute the films.

every lower court to consider the question has upheld the constitutionality of Congress's judgment (Appellants' Br. 34 n.27). If the FARA as a whole is a valid exercise of Congress's authority, as this Court has assumed, then the definition of "political propaganda," which serves only an incidental role in the statutory scheme, is equally valid. Cf. *Posadas de Puerto Rico Associates v. Tourism Co.*, No. 84-1903 (July 1, 1986).

Not least among the reasons for refusing to recognize a right to be free from adverse governmental comment is the impossibility of its judicial definition and enforcement. As the court explained in *Block v. Meese*, 793 F.2d at 1313, "[t]he practical problems of excluding the government from ideological debate are alone enough to suggest that, even if it were a socially desirable objective, it is not an objective to be pursued by the courts." Unless the government were foreclosed from engaging in ideological debate, appellee's theory would require the courts, without the benefit of any guidance in the text or history of the First Amendment, to decide what constitutes official government action for this purpose and to distinguish among a statute like the FARA, a concurrent resolution of both houses of Congress, a presidential address, a statement of a cabinet member, a speech by a member of Congress, or a statement by the head of a political party.⁹ Appellee's

⁹ Appellee makes no effort to limit the scope of the First Amendment right he endorses. Presumably any speech by any government official in his official capacity on any subject is subject to challenge under his theory. This is particularly true since appellee's argument rests on the claim that the term "propaganda" has an empirically provable, and negative, effect on public opinion. Appellee's argument does not foreclose the possibility that a court will decide what opinions

theory, moreover, would require courts to engage in the line-by-line dissection of such statements to ensure that no statement of any type deterred any person from believing a speaker unless the government could demonstrate a compelling interest for its choice of words. Appellee essentially asks the courts to act as the censor of the political speech of the representative branches of government.

For the foregoing reasons and those set forth in our opening brief, the judgment of the district court should be reversed and the case remanded to that

the President may express about the foreign political speech covered by the Act; that possibility alone is sufficient to require that appellee's argument be rejected.

Amici (ACLU et al. Br. 21; Playboy Enterprises, Inc., et al. Br. 14-15) make a limited effort to circumscribe the scope of the First Amendment right they and appellee endorse. Amicus ACLU et al. say nothing more than that this case is at the end of the spectrum; they fail to explain how wide that spectrum is or how different types of political speech can be fit along it. Amicus Playboy Enterprises et al. argue that speech by government officials should be forbidden whenever it "will suggest *governmental condemnation*, and thus will cause a substantial segment of the public to shun or reject the private speech without serious consideration of its merit" (at 14-15 (emphasis in original)). That standard is little better than none at all. Amicus offers no explanation of what constitutes a "substantial segment of the public" or "serious consideration" of the merits of speech; every derogatory statement (however that term is defined) by a public official can be deemed to be condemnation under amicus's theory. In addition, amicus has failed to explain why only government condemnation is forbidden, and not also governmental praise. See *Block v. Meese*, 793 F.2d at 1313. Finally, that standard has no application to this case, because appellee's speech is clearly public, not private (J.A. 46-47, 110-111).

court with directions to dismiss the complaint for lack of standing. In the alternative, the judgment of the district court should be reversed and the case remanded to that court with directions to enter judgment for appellants.

Respectfully submitted.

CHARLES FRIED
Solicitor General

NOVEMBER 1986

AMICUS CURIAE

BRIEF

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(4)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EDWIN MEESE III, ATTORNEY GENERAL OF THE
UNITED STATES, AND JOSEPH E. CLARKSON,
v. *Appellants*

BARRY KEENE,
Appellee

On Appeal from the United States District Court
for the Eastern District of California

**MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE
OF THE WASHINGTON LEGAL FOUNDATION
AND THE ALLIED EDUCATIONAL FOUNDATION**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1180

EDWIN MEESE III, ATTORNEY GENERAL OF THE
UNITED STATES, AND JOSEPH E. CLARKSON,
Appellants

v.

BARRY KEENE,
Appellee

On Appeal from the United States District Court
for the Eastern District of California

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
OF THE WASHINGTON LEGAL FOUNDATION
AND THE ALLIED EDUCATIONAL FOUNDATION**

The Washington Legal Foundation ("WLF") and the Allied Educational Foundation ("AEF") move the Court pursuant to Supreme Court Rule 36.3 for leave to file the within brief *amicus curiae* in support of the appellants.

The appellant has consented in writing to the submission of this brief. However, counsel for appellee Barry Keene has declined to provide such consent.

1. *Interests of Amici.* WLF is a non-profit, pro-free enterprise public interest law center with nationwide membership, based in Washington, D.C. WLF engages in litigation and administrative cases concerning a variety of issues of concern to its membership. One of WLF's primary goals is the preservation and enhancement of U.S. national security. WLF has been especially active in cases involving attempts to impose judicial constraints on the federal government's capacity and authority to protect national security. For example, WLF has filed briefs supporting the President's prerogative to undertake national security programs or initiatives in cases such as *United Presbyterian Church v. Reagan*, 758 F.2d 1375 (D.C. Cir. 1985) and *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983). WLF also strongly supports effective enforcement of the Foreign Agents Registration Act ("FARA"), and has recently filed a submission with the Justice Department seeking enforcement of that Act against a non-complying foreign agent.

WLF is interested in this case because the lower court's ruling sharply undercuts the government's capacity to counteract the deceptive and sometimes insidious propaganda ploys of the many foreign agents working in this country. The notion that the government cannot label or characterize these foreign propaganda assaults for what they are would be merely laughable were it not the actual holding of an actual U.S. District Court. As it is, the district court's holding could seriously prejudice a wide variety of important regulatory measures, in the national security area and elsewhere.

The Allied Educational Foundation ("AEF"), established in 1964, is a non-profit charitable and educational foundation based in Englewood, New Jersey, and devoted to the expansion of knowledge and education in a broad variety of areas. A principal area of AEF's concern has been the increasingly critical problem of accuracy in

media. In this respect, AEF sponsors periodic "Accuracy in Media Conferences," involving scholars, journalists, and students, designed to encourage truthful and accurate reporting in the media and to expose false and distorted propaganda presentations portrayed as "news." AEF's particular interest in this case derives from its concern that the propaganda activities and disseminations of foreign agents be fairly disclosed as such, rather than parading as disinterested, objective information and views.

2. *Particular Questions to be Addressed.* The brief of WLF and AEF will primarily focus on the question of whether the First Amendment restricts the government from using legislative, regulatory, or other "official" terms which may be intentionally denigrating or derogatory in their description of speech or other communicative matter subject to regulation.

We suggest that this particular issue of the case may not be thoroughly addressed in the existing parties' briefs. In its Jurisdictional Statement, the United States contended that the term "political propaganda" as used in the FARA either does not have a pejorative meaning or, even if it does, it was intended to be used in a purely neutral sense (J.S., 14-15). While *amici* do not dispute that contention, we submit that it is not necessary to grapple with such fine points of semantics or abstract legislative intent in this case. We argue that even if the statutory term in question *was* intentionally pejorative, the First Amendment does not commission the federal courts to censor Congress in its drafting of measures dealing with serious matters of national security such as deceptive foreign propaganda.

This particular issue could be crucial to disposition of this case if the Court prefers to avoid the thorny questions of semantics and congressional intent, or if it is sharply divided on those issues.

Accordingly, the Washington Legal Foundation and the Allied Educational Foundation respectfully move the Court for leave to file the annexed brief *amicus curiae*.

Respectfully submitted,

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Dated: July 7, 1986

QUESTIONS PRESENTED

1. Whether the First Amendment prohibits Congress from using derogatory or denigrating terms in referring to communicative activity or materials in legislation validly regulating such activity or materials.

2. Whether the First Amendment's prohibition against government censorship or abridgement of free speech simultaneously prohibits the government from freely expressing itself in responding to criticism and condemnation directed against it.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

 No. 85-1180

EDWIN MEESE III, ATTORNEY GENERAL OF THE
 UNITED STATES, AND JOSEPH E. CLARKSON,
Appellants

v.

 BARRY KEENE,

Appellee

On Appeal from the United States District Court
 for the Eastern District of California

**BRIEF AMICUS CURIAE
 OF THE WASHINGTON LEGAL FOUNDATION
 AND THE ALLIED EDUCATIONAL FOUNDATION**

INTEREST OF AMICI CURIAE

The interests of the Washington Legal Foundation ("WLF") and the Allied Educational Foundation ("AEF") as *amici curiae* in this case are fully set forth in the foregoing motion for leave to file brief *amicus curiae*.

STATEMENT OF THE CASE

In the interests of judicial economy, WLF and AEF adopt and incorporate by reference herein the Statement of the Case set forth in the brief of the appellants, Edwin Meese III, Attorney General, and Joseph E. Clarkson.

SUMMARY OF ARGUMENT

1. The First Amendment does not prohibit Congress from using language considered derogatory or "denigrating" in referring to communicative activity covered by the First Amendment in legislation—such as the Foreign Agents Registration Act ("FARA")—legitimately regulating such activity. Such a restriction would not only necessitate intolerable judicial interference with the legislative process, but it would impermissibly censor the government in its efforts to respond and defend itself in the war of words waged by both foreign and domestic political opponents. The theory of the district court's ruling is that the government is constitutionally barred from officially referring to the speech, writings, or electronic communications of its enemies (and of its friends) with reproachful, critical, or negative terminology. When this theory is followed to its logical conclusion, even the President's State of the Union message would be subject to judicial censorship of derogatory language. The theory of the lower court's ruling grossly distorts the First Amendment and would impose an unprecedented and intolerable form of judicial interference with the other branches.

2. Statutes containing derogatory terms comparable to the FARA's use of "political propaganda" are necessary, commonplace, and obviously constitutional. Such derogatory terms are pervasive in both the U.S. Code and the 50 state codes, and are used to describe matters ranging from "pandering advertisements" in the U.S. mails to "foreign corrupt practices" in connection with the purchase and sale of securities. Acceptance of the district court's legal theory would immerse the judiciary in the painstaking, controversial, and interminable task of excising all pejorative terms applicable to any First Amendment "speech" from the U.S. and state statutory codes. Neither case law nor constitutional history remotely suggest the necessity or permissibility of such an undertak-

ing. Such detailed and pervasive judicial involvement in the selection of acceptable legislative content would also violate the separation of powers doctrine.

ARGUMENT

Preliminary Statement

Under the Foreign Agents Registration Act ("FARA"), 22 U.S.C. § 611 *et seq.*, Congress requires agents of foreign governments operating in the United States to publicly identify their relationship to those governments when they disseminate political propaganda. The policy of the FARA is that, even while we allow these foreign agents the benefit of our First Amendment in spreading the viewpoints of their principals, the American audience has a right to be informed of the true source of the information. Thus, when countries such as the Soviet Union, Nicaragua, or Saudi Arabia hire American agents and "PR men" to promulgate their policy views—as they often do—Americans have a right to know that these speakers are the paid agents of foreign states, as distinct from Americans expressing their own independent views. The registration and disclosure provisions of the FARA are the legal mechanisms that effectuate that policy goal.

Congress reasonably chose the term "political propaganda" to describe the category of communicative or expressive matter covered by the Act. It might have chosen a more neutral term, such as "public relations materials" or "policy advocacy", but it settled on the more specific and descriptive term, "political propaganda", instead. For purposes of clarity and comprehensibility, it is hard to fault Congress for its choice of terms. Those words—political propaganda—accurately and cogently describe the *actual object* of the regulatory scheme in a direct and unambiguous manner. It is difficult to conjure a different phrase which better describes the object of the statute. In any case, neither the court nor the appellee has proffered a more apt term.

More fundamentally, it is a radical distortion of the division of power in our constitutional system to assert that courts are empowered and required to second-guess Congress in its choice of the terms to be used in legislation. Acceptance of the district court's theory would require a massive judicial purging of the U.S. Code, to eliminate all derogatory reference to so-called "First Amendment materials." It would also work an unprecedented judicial interference with legislative power and discretion. The lower court's opinion should therefore be rejected and reversed in the most emphatic terms.

I. THE FIRST AMENDMENT DOES NOT PROHIBIT CONGRESS FROM USING TERMS CONSIDERED "DENIGRATING" OR DEROGATORY IN DESCRIBING FORMS OF SPEECH OR COMMUNICATION SUBJECT TO LEGITIMATE REGULATION.

A. Government Disparagement or Criticism of Speech Cannot Be Validly Equated with "Abridgement" of Speech.

In this case, the district court held that a disparaging or derogatory characterization used in a statute otherwise validly regulating the categories of speech or writings so characterized constitutes an unconstitutional abridgement of speech under the First Amendment. The court's ruling means that the U.S. Department of Justice cannot classify certain Canadian films subject to the Foreign Agents Registration Act, 22 U.S.C. § 611, as "political propaganda." But this holding could just as easily be applied to bar the government from, for example, applying the term "racketeering" to forms of speech or communications used for purposes of extortion and violence under federal criminal racketeering laws. See 18 U.S.C. § 1961. Indeed, the potential applications of the lower court's ruling are as extensive and diverse as the index to the U.S. Code—and those of the 50 state codes as well.

This extraordinary holding would generate a whole new dimension to First Amendment jurisprudence, extending current judicial restraints on government regulatory measures far beyond anything heretofore recognized in our law. By invalidating and enjoining use of the very terms Congress uses to legislate, the courts would seriously compromise and undermine the legislative power.

Under the district court's approach, speech and other forms of communication would no longer be immune merely from government censorship or restriction; they would now be immune even from critical or derogatory response, as long as the response is officially generated by the government.

The language used by the district court needs no embellishment in order to convey its novel, even radical, interpretation of the First Amendment's scope (J.S. App. A, p. 16a):

[T]he question presented is whether Congress may, consistent with the Constitution, apply a denigrating phrase to those materials thereby rendering the materials unavailable to American citizens who wish to use the materials as media for personal expression. [Emphasis added.]

The court answered that question squarely in the negative.¹ It held that "the use by Congress of an inflammatory phrase to designate (or denigrate) clearly protected First Amendment materials abridges (plaintiff's) speech." *Id.* at 21a.

Thus, this Court is presented with the question of whether government statutes, decrees, and regulations

¹ It should be stressed that the court's statement of the issue also contained a blatant *non sequitur*. There is simply no plausible basis for the conclusion that merely by applying a denigrating phrase to materials Congress somehow renders those materials "unavailable."

must now be subjected to judicial scrutiny to assure that they do not "denigrate" or demean anything that is considered subject to First Amendment protection. In a larger sense, as recently recognized by the D.C. Circuit's contrary ruling on this same issue in *Block, et al. v. Meese, et al.*, No. 84-5318, Slip. Op. at 15-17 (June 18, 1986) (per Scalia, J.; Bork and Wright, JJ., concurring), the question is whether the First Amendment may be invoked to muzzle the government in the context of the "robust and wide-open debate" it guarantees for others. See *New York Times, Inc. v. Sullivan*, 376 U.S. 254 (1964).

Here, the district court held that Congress cannot use a derogatory or disparaging term, like "political propaganda," in legislation regulating the efforts of foreign powers to manipulate American public opinion.

One of the most basic and critical flaws in the court's analysis was its illogical and insupportable attempt to equate the mere disparagement or "denigration" of speech with the unconstitutional "abridgement" of speech. Thus, without even attempting to demonstrate the cause and effect relationship it so blithely assumed, the court continually asserted that the FARA's use of denigrating terms in labelling these "First Amendment materials" *ipso facto* renders them "unavailable" to citizens. It is not going too far to describe this *non sequitur* for what it is—nonsense. Even if the lower court's remarkable conclusion regarding the "unavailability" of the films—which were in fact freely available and openly exhibited—were treated as a finding a fact, it is clearly erroneous and should be set aside without compunction.

The mere "denigration" of the films in question as "political propaganda" does not remotely constitute a restriction or abridgement of those materials as proscribed by the First Amendment. They remained as available to any willing or interested viewer as any other film. Their

"availability" to the public was controlled only by the resources and enthusiasm of their distributors and exhibitors, not by the terms of the obscure government statute which were not appended to or inscribed on the materials in any event. The U.S. Government did nothing at all to interdict or restrict the distribution of availability of the materials in question.

Thus, as stated by the D.C. Circuit in *Block v. Meese, supra*, Slip Op. at 15:

[E]ven if classification as "propaganda" constituted an expression of official government disapproval of the ideas in question, neither precedent nor reason would justify us in finding such an expression in *itself* unlawful.

The D.C. Circuit's opinion in *Block* merely states the obvious point that the First Amendment does not require the government to stand mute amidst the war of words—i.e., propaganda—that constantly swirls around it. That is, the government *can* disparage the arguments of its critics without being held liable for censoring or restraining those arguments.

If the lower court's ruling were to be ratified by this Court, the government's ability to respond effectively to both domestic and foreign propaganda attacks—especially those involving deceit or misrepresentation—on its programs and policies would be drastically undermined. And while no one disputes the right of both domestic and foreign advocates to vigorously criticize U.S. policies, there should likewise be no question concerning the government's right and responsibility to *respond* to such criticism—and to inform the public about all the pertinent facts of such disputes.

One key fact in many such public policy debates is the ultimate source and sponsorship of arguments and claims put forth as legitimate domestic opinion, but actually representing the designs of hostile foreign governments.

That is why Congress has passed full disclosure legislation governing not only foreign agents, but domestic lobbyists as well. See, e.g., 2 U.S.C. § 261.

In regulating activities such as lobbying, sales promotional literature, or the public relations campaigns of paid foreign agents, Congress need not strain to avoid the use of accurately descriptive terms that some might find "denigrating" to the activities or materials in question. For example, many would regard the term "lobbying" itself to be demeaning or denigrating, in the same sense that this plaintiff claims to consider the term "political propaganda" denigrating. Yet no court has ever seriously questioned the use of terms such as "lobbying" by Congress in drafting legislation to regulate such activity, see 2 U.S.C. § 261.

The fact is that the "negative" or "disparaging" element of descriptive terms used in statutes generally reflects the very problem that warrants regulation in the first place. The FARA refers to "political propaganda" because it is the dissemination of precisely that category of communications (rather than, say, "historical exposition" or "artistic criticism") by undisclosed or concealed foreign sources that warrants the requirements for registration and disclosure.² Similarly, federal postal legislation refers to "pandering advertisements" sent through the mails because that is a fair and understandable description of a specific class or category of materials warranting regulation. See 39 U.S.C. § 3008. A neutral or nonjudgmental term would be more cumbersome, less understandable, and less efficient for achieving the legitimate legislative purpose. Other federal statutes, for the same reasons, similarly refer to various forms of regu-

² See *Block v. Meese*, *supra*, Slip. Op. at 13, where the court stated that the term "political propaganda" . . . "is understood to mean precisely the type of political speech the dictionary definitions quoted above describe (and which no other English word accurately describes) . . ." [Emphasis added.]

lated "First Amendment activity" by inflammatory or derogatory terms such as "harassment or abuse" (15 U.S.C. § 1692c), "Filthy or vile thing(s)" (39 U.S.C. § 3006), and "broadcasting profane language" (18 U.S.C. § 1464).

Appellees and the court below would have it that Congress (and by logical extension, all government bodies or entities) must abstain from such judgmental or critical terms in drafting laws regulating anything that constitutes a form of communication— i.e., anything "covered" by the First Amendment. They assert that for government to denigrate any category of speech is to *ipso facto* reduce its availability or dissemination, and thereby "abridge" free expression in violation of the Constitution. Thus, because the statutory reference to certain types of mailed materials as "pandering advertisements" might theoretically cause some people to be less receptive to them, the district court's ruling would likewise strike down that section of the postal laws as unconstitutional.

A moment's consideration of the implications of the lower court's ruling reveals its radical and implausible nature. If Congress may not "denigrate" any form of communication in the terms of the bills it enacts, it follows inexorably under current First Amendment theory that the President and all other officers of the executive branch must likewise refrain from such denigrating epithets in their decrees, regulations, or other official statements. It has long since been settled that the First Amendment prohibits executive and administrative interference with free speech to the same extent as legislative interference.

For example, if Congress may not refer to the Canadian films as "political propaganda" in a statute, then neither could the Attorney General do so in regulations, guidelines, or instructions implementing that statute. The

FTC, the FCC, the FDA, and the Consumer Product Safety Commission would all have to exercise enormous care and restraint to assure that their regulations of advertising literature, programs, and films were not excessively reproachful or condemnatory. In fact, the "logic" of the district court's holding inescapably leads to the conclusion that the *President* would violate the First Amendment if he "officially" warned the American people against the threat of "pernicious foreign propaganda" promulgated by, e.g., agents of the Nicaraguan Sandinistas, in a State of the Union address or Presidential Proclamation. This very point was stressed by Judge Scalia in his opinion for the D.C. Circuit in *Block v. Meese, supra*, rejecting the theory adopted by the district court in this case. As the *Block* opinion noted, "Presumably, [even] a joint resolution of Congress . . . would suffice" to trigger the First Amendment concerns raised here. *Id.* at 17-18.

There is nothing in the lower court's opinion suggesting that derogatory labeling of speech or writings by the individual officers or agencies of the executive branch would, under the court's theory, be any less injurious to First Amendment freedoms than the derogatory statutory definition at issue in this case. The decision emphasizes instead the alleged adverse impact on maximum dissemination of communications caused when materials are officially disparaged by the *government*. J.S. App. A at 26a-27a.

The district court's holding proves far too much. Carried to its logical conclusion, it would seriously stifle the government's ability to communicate, regulate, and legislate with respect to so-called "First Amendment materials"—i.e., anything which purports to communicate. The government's very ability to communicate with the governed would be severely handicapped, because "it dare not speak the name" of the very problems it needs to deal with. The district court's theory would also necessitate

a degree of judicial intervention into legislative draftsmanship and executive regulation that would undoubtedly run afoul of the most basic separation of powers principles. *Cf. Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). The First Amendment has never before been interpreted to have such a counterproductive and disruptive effect, and there is no plausible basis for the belated judicial discovery of such a radical new meaning.

B. The Use of "Denigrating" Terms in Regulatory Statutes is Commonplace, Necessary, and Constitutional.

The lower court held that Congress violates the First Amendment whenever it uses "denigrating" or "reproachful" terms to describe or define communicative materials or activities otherwise subject to legitimate legislative regulation. The court's theory is that such denigration somehow abridges the First Amendment rights of those who seek to disseminate and/or receive these communications. More specifically, the court's decision speculates that the "stigma" of public association with that which is officially labeled "political propaganda" under the FARA will somehow intimidate potential recipients and cause a form of defensive self-censorship. J.S. App. A, pp. 26a-27a. Although it is not immediately clear how or why the government should be held accountable for the hysterical overreactions of the hypersensitive, the district court forged ahead with this theory undeterred.

It hardly needs to be emphasized that this represents a radical and far-reaching theory of constitutional law. This theory requires, in essence, that all legislation touching upon speech (in the broad sense) be purged of all judgmental terminology and limited to neutral or complimentary terms. Its ratification by this Court would have implications far beyond the narrow confines of the FARA.

The present United States Code is peppered throughout with comparable (and worse) negative terms which are routinely applied to other materials, organizations, or activities covered by First Amendment protections.³ The same arguments made against the FARA in this case could be made against those other federal statutes and thousands of similar state statutes as well. Yet this Court and the lower federal courts have routinely applied and upheld those statutes and their language for decades. The dubious legal foundations of the decision below are woefully inadequate to support the far-reaching revision of the statute books which it would require if affirmed by this Court.

It is absurd to contend that Congress must confine itself to the use of neutral or favorable terms when it defines the subject matter it seeks to regulate in federal statutes. For example, many persons engaged in honest work might consider the term "lobbying" as carrying negative connotations in the same manner that the term "political propaganda" is said to be derogatory in the present context. But Congress is hardly barred for that reason from entitling a regulatory statute as the "lobbying Act" or from defining just what it means by "lobbying" in furtherance of its objective to regulate and even limit such activity within observable boundaries.

³ *E.g.*, 39 U.S.C. § 3008 (prohibition of "pandering advertisements" in U.S. mails); 2 U.S.C. § 267 (regulation of "lobbyists"); 2 U.S.C. § 241-248 (regulating "federal corrupt practices" involving political campaigns; since repealed); 15 U.S.C. § 78dd-1, 2 (regulation of "foreign corrupt practices" in connection with federal securities laws); 15 U.S.C. § 1692d (categories of commercial communication labeled as "harassment or abuse"); 18 U.S.C. § 1464 ("broadcasting profane language"); 18 U.S.C. § 1961 ("racketeering activity" including the transmission of gambling information); 18 U.S.C. § 1462-64 (prohibiting "obscenity" in U.S. mails); 39 U.S.C. § 3006 ("Filthy or vile things" sold through the U.S. mails); 50 U.S.C. § 782(3)-(5) ("Communist front organization"; "Communist-action organization"; "control of subversive activities").

Further, if Congress may not classify the public relations activities of foreign agents as "political propaganda" for the reasons cited by the lower court, then the use of the term "pandering advertisements" in the "Non-mailable Matter" provisions of federal postal legislation would also be unconstitutional. See 39 U.S.C. § 3008. Undeniably, the term "pandering advertisements" denigrates a broad variety of so-called "First Amendment materials" just as "political propaganda" allegedly denigrates the public relations campaigns of foreign powers advocating their cases to the American public. Similarly, the district court's approach would prohibit the criminal code from using the label of "profane language" in describing a category of speech which cannot be broadcast over the airwaves. 18 U.S.C. § 1464.

Endorsement of the district court's approach would likewise collide with this Court's opinion in *Communist Party of the U.S. v. Subversive Activities Control Board*, 367 U.S. 1 (1961), where comparable First Amendment challenges to the validity of the Subversive Activities Control Act ("SACA") were forcefully rejected in a highly pertinent opinion by Justice Frankfurter. The SACA uses several "denigrating" definitions which would surely fall within the sweep of the district court's ruling in this case: *e.g.*, "communist front organization", "communist-action organization", "subversive activities," "advocating . . . totalitarianism," etc. See 50 U.S.C. § 782(3)-(5)(18)-(19). Such terms have at least the same degree of negative or inflammatory impact as "political propaganda." Moreover, they are applicable to a wide range of activities falling within the scope of the First Amendment.

In upholding the various provisions of SACA, this Court stressed that where there are compelling considerations of national security and threats of foreign subversion, Congress must be given considerable leeway to deal with the threat. As the Court said:

[W]here the problems of accommodating the exigencies of self-preservation and the values of liberty are as complex and intricate as they are in the situation described in the findings of § 2 of the Subversive Activities Control Act—when existing government is menaced by a world-wide integrated movement which employs every combination of possible means, peaceful and violent, domestic and foreign, overt and clandestine, to destroy the government itself—the legislative judgment as to how that threat may best be met consistently with the safeguarding of personal freedom is not to be set aside merely because the judgment of judges would, in the first instance, have chosen other methods. [367 U.S. at 96-97; emphasis added].

The Court in *Communist Party v. SACB* also discussed a variety of similar regulatory schemes by way of demonstrating the validity of the SACB.—Significantly, Justice Frankfurter discussed the Foreign Agents Registration Act (“FARA”) at some length as a persuasive example of valid government measures which may inescapably involve some tension with free-wheeling First Amendment values. Moreover, the Court specifically cited and discussed with obvious approval the very provisions and terms of the FARA challenged in this action. 367 U.S. at 100. In this discussion, the Court pointedly observed that, under the FARA requirements:

Such [foreign] agents must also file with the Attorney General and the Librarian of Congress, and must label as emanating from a registered agent of a foreign principal, and mark with the name of the agent and the principal, any political propaganda transmitted in the United States mails or through any instrumentality of interstate commerce. [Emphasis added.]

Significantly, the Court’s discussion of the FARA went on to stress the difficulties of enforcing these laws “due in part to the skill and deceit which the Communists have

used in concealing their foreign ties.” *Id.* at 101. Far from questioning the constitutionality of the FARA scheme, this Court held it out as an exemplary provision in this sensitive area.

The SACB decision shows that this Court has already considered in detail the pertinent provisions of the FARA, and has not even suggested that they might violate the First Amendment. Nothing is presented in this case which would justify any change in this approach.

Having fully explained and endorsed the regulation of “political propaganda” under the FARA, this Court’s opinion in the SACB case went on to describe the proper balance between the sometimes conflicting considerations of free speech and internal security:

Where the mask of anonymity which an organization’s members wear serves the double purpose of protecting them from popular prejudice and of enabling them to cover over a foreign-directed conspiracy, infiltrate into other groups, and enlist the support of persons who would not, if the truth were revealed, lend their support . . . it would be a distortion of the First Amendment to hold that it prohibits Congress from removing the mask. [367 U.S. at 102-103; citation omitted].

The Court also observed that, while registration and disclosure schemes such as the SACA and the FARA may generate a degree of “public opprobrium and obloquy” attaching to those identified, these considerations do not “incapacitate government to require publicity demanded by rational interests high in the scale of national concern.” *Id.* at 102.

Justice Frankfurter’s observations in the SACB case aptly identify the crucial issue which is at stake here as well. The First Amendment, which this Court has consistently linked with the public’s right to be informed, e.g., *New York Times, Inc. v. Sullivan*, 376 U.S. 254

(1964), was invoked by the district court here to *undermine* public disclosure concerning the true source of foreign propaganda disseminated in this country. Rarely has a more ironic perversion of the First Amendment been seriously advanced by a federal court. This Court should make it clear in this case that the First Amendment does not muzzle or shackle the government when it undertakes measures designed to counteract such threats as the disinformation campaigns waged in this country by hostile or antagonistic foreign powers.

C. The Decision Below Violates Separation Of Powers.

Aside from its impact on the numerous derogatory terms already incorporated in the U.S. Code, the theory adopted by the district court presages enormous and unprecedented expansion of the basic process of judicial review. In fact, it would expand the courts' role in passing upon the validity of statutory language to a degree that would surely violate the separation of powers doctrine. Congress would be required to draft statutes with a view to anticipating the linguistic sensibilities of over 700 federal judges who, each by his own predilections, might find the terms used by Congress unacceptably "denigrating" or "derogatory." In effect, all legislation touching on speech would have to be sanitized and "neutralized" to avoid offending the sensitive and the thin-skinned.

This Court's decisions have long recognized that courts have no business second-guessing the legislative draftsmanship of Congress. As stated in *United States v. Rutherford*, 442 U.S. 544, 555 (1979), "Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy." Moreover, this admonition against judicial intrusion has special force in the areas of national security and foreign relations, where deference to legislative dis-

cretion is especially appropriate—and where judicial competence is especially questionable, *Communist Party v. SACB*, *supra*, 367 U.S. 96-97; *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981). As the Court emphasized in the latter case, *id.* at 64:

The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States. As Justice Frankfurter noted in *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 164, 71 S. Ct. 624, 644, 95 L.Ed. 817 (1951) (concurring opinion), we must have "due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government."

Both the substance and the spirit of the lower court's opinion are at war with the bedrock principles stated in *Rostker v. Goldberg*. The district court's harsh condemnation of statutory language which has weathered forty years of judicial, legislative, and executive scrutiny reflects a fundamental failure to comprehend the limits of judicial review and of First Amendment experimentation.

This Court should act to reinforce the healthy balance that should exist between the three branches of our government by condemning the lower court's exercise in judicial arrogation and anti-government censorship.

CONCLUSION

The district court's ruling represents a radical distortion of the First Amendment's relationship to legislation and the legislative process. Constitutional protection of free speech does not limit the government's right to respond to the speech of its critics with counter-criticism. Congress is free to use the terms of its choice in drafting legislation, without needing to conform its terms to the predilections of hundreds of federal judges. The district court's decision should be reversed.

Respectfully submitted,

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Dated: July 7, 1986

AMICUS CURIAE

BRIEF

SEP 15 1986

No. 85-1180

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

EDWIN MEESE III, ATTORNEY GENERAL OF THE
UNITED STATES AND JOSEPH E. CLARKSON,

v. *Appellants,*

BARRY KEENE,

Appellee.

On Appeal from the United States District Court
for the Eastern District of California

**BRIEF OF *AMICI CURIAE* PLAYBOY ENTERPRISES,
INC. AND AMERICAN BOOKSELLERS ASSOCIATION
IN SUPPORT OF APPELLEE**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

No. 85-1180

EDWIN MEESE III, ATTORNEY GENERAL OF THE
UNITED STATES AND JOSEPH E. CLARKSON,
Appellants,

v.

BARRY KEENE,
Appellee.

On Appeal from the United States District Court
for the Eastern District of California

BRIEF OF *AMICI CURIAE* PLAYBOY ENTERPRISES,
INC. AND AMERICAN BOOKSELLERS ASSOCIATION
IN SUPPORT OF APPELLEE

INTEREST OF *AMICI CURIAE*

Amicus Playboy Enterprises, Inc. ("PEI") is a Delaware corporation and is the publisher of *Playboy* Magazine. *Amicus* American Booksellers Association ("ABA") is a trade association organized in 1900 and incorporated in 1936. At the present time, that association includes approximately 4,000 members and 7,000 branches. Such members include all of the very largest bookstore chains, most general interest bookstores, many college and university bookstores, and many department and variety

store chains with book departments or subsidiaries. The members of the association account for approximately 80% of all sales of general interest books by general interest bookstores.

Amici's interest in this case stems both from their longstanding support for First Amendment rights and from their recent experience as targets of governmental condemnation intended to suppress constitutionally protected speech published by PEI and distributed by members of ABA.

In February 1986, the Executive Director of the Attorney General's Commission on Pornography sent letters to numerous companies involved in the distribution or sale of *Playboy* and other publications. This letter warned that the Commission had heard testimony indicating that those companies were involved in the sale or distribution of "pornography" and that, absent a satisfactory response, the companies would be listed in the Commission's Final Report as "identified distributors" of pornography. In fact, the only testimony supporting this allegation was provided by the Executive Director of the National Federation for Decency, and the Commission was aware that this witness' all-encompassing definition of "pornography" included a vast amount of non-obscene and entirely lawful material. As a result of the Commission's letter, many companies terminated their distribution and sale of *Playboy* and other publications engaging in constitutionally protected speech. Among those companies was the parent corporation of one of ABA's members (Rite-Aid Drugs), which, together with other large retail chains, discontinued the sale of *Playboy* and other publications.

PEI, ABA and other plaintiffs challenged the Pornography Commission's actions. *Playboy Enterprises, Inc. v. Meese*, Civil Action No. 86-1346 (D.D.C.). The Pornography Commission opposed injunctive relief, relying upon the D.C. Circuit's approval of the government's use of the label "political propaganda" in *Block*

v. Meese, 793 F.2d 1303 (D.C. Cir. 1986). On July 3, 1986, Judge John Garrett Penn ruled that in the circumstances of the *Playboy* case, the plaintiffs would probably prevail on their contention that the Pornography Commission's threat to label companies as "identified distributors of pornography" violated the First Amendment, and he therefore granted PEI, ABA and the other plaintiffs injunctive relief, requiring retraction of the Pornography Commission's letter. See 55 U.S.L.W. 2045 (1986).

PEI and ABA believe that their participation as *amici* in this case will help inform the Court of the many contexts in which governmental condemnation of speech can intimidate and thereby suppress the exercise of First Amendment rights. *Amici* note that the government labeling at issue in this case is of concern not only to producers or distributors of motion pictures, but also to producers or distributors of printed material. To the consuming public, the term "political propaganda" is clearly a pejorative term. This is particularly true when applied to expressive materials issued by a foreign government, published by a foreign publisher and/or written by a foreign author. The term "political propaganda" conjures up images of the propaganda used by Joseph Goebels on behalf of the Third Reich, or by other authoritarian governments.

If books and magazines published and/or authored abroad are permitted to be identified as "political propaganda" by an agency of the United States Government, the chilling effect on many, if not most booksellers, will be enormous. *Amici* believe that if large retail chains would engage in self-censorship because of the threat of being labeled "distributors of pornography," the chilling effect of being described as distributors of "political propaganda" would result in similar self-censorship. Rather than engender the wrath of many customers,

some, if not most booksellers, can therefore be expected to engage in a form of self-censorship whereby any book or periodical classified as "political propaganda" will not be stocked by such bookseller.

Counsel for appellants and appellee have both consented to the filing of this *amici* brief. Their letters of consent are being filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

Amici will show that in the circumstances of this case, the government's use of the highly pejorative label "political propaganda" unduly abridged First Amendment rights. The use of that label violated the First Amendment both because Congress required application of that label for the purpose of deterring constitutionally protected speech, and also because application of that label constituted not just criticism but "condemnation" of private speech by an official agency of government. *Amici* will therefore urge the Court to affirm the judgment of the District Court.

Should the Court reverse, however, *amici* will urge the Court to limit its holding to the precise facts of this case, and to reaffirm the general principle, reflected in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), *Lamont v. Postmaster General*, 381 U.S. 301 (1965), and in numerous other cases described by *amici*, that there are constitutional limitations on the government's power to "condemn" lawful speech, even when the government does not directly prohibit that speech.

ARGUMENT

I. THE GOVERNMENT'S CLASSIFICATION OF THE CANADIAN FILMS AS "POLITICAL PROPAGANDA" VIOLATES THE FIRST AMENDMENT.

Introduction

In this case a government agency, acting at the direction of Congress, has officially labeled core political speech as "political propaganda."¹ It is undisputed that the government could not constitutionally prohibit dissemination of the films involved in this case. At issue then, is whether the First Amendment allows the government to take official action to condemn these films in a manner that will deter communication or receipt of this constitutionally protected speech.

Amici submit that the answer to this question is no. It is well established that the First Amendment does not simply forbid government action that directly prohibits speech. In a wide range of circumstances, this Court and others have held that numerous government actions other than direct prohibition unconstitutionally deterred speech. Although these cases have wisely avoided announcing a generic test to determine when government action other than a direct prohibition violates the First Amendment, at least two of the circumstances in which such violations are commonly found are discernible. If the very purpose of the government's action is to suppress speech, that action violates the First Amendment. Moreover, even when such a purpose is not clear, if the government's action is tantamount to a "condemnation"² of

¹ The Registration Unit of the Internal Security Section of the Criminal Division of the United States Department of Justice made an official governmental determination that the films at issue in this case were "political propaganda" within the meaning of the Foreign Agents Registration Act. *Keene v. Meese*, 619 F. Supp. 1111, 1116 (E.D. Cal. 1985).

² *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965).

speech, and that condemnation appears to have the authority or force of government behind it, the government's action abridges First Amendment rights.

In this case, the government's labeling of constitutionally protected speech as "political propaganda" involved both a purposeful attempt to suppress speech and an official act of government condemning that speech. For both reasons, the government's action is constitutionally infirm.

A. It Is Well Established That Government Action That Deters Speech May Be Unconstitutional Even If The Government Does Not Directly Prohibit That Speech.

Because of its unique power and prestige, the government is capable of exerting "indirect coercive pressure" that can be as effective in deterring speech as direct governmental prohibitions. As the Court recognized in *American Communications Association v. Douds*, 339 U.S. 382, 402 (1950), "[u]nder some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes."³

In countless cases, the Court has found direct government attempts to "prohibit" speech to be unconstitutional. It would severely undermine this basic rule to permit government to accomplish the same end through other means which, while less direct, effectively deter the exercise of First Amendment rights. As the Court explained in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963),

³ In related contexts, the Court has recognized that because of its special status, government actions can have an unconstitutionally coercive effect. In *Engel v. Vitale*, 370 U.S. 421, 430 (1962), for example, the Court observed that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Accord Wallace v. Jaffree*, 105 S. Ct. 2479, 2497 (1985) (O'Connor, J., concurring).

"[i]t is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments."

Consequently, it is well established that "the fact that no direct restraint or punishment is imposed upon speech . . . does not determine the free speech question." *American Communications Association*, *supra*, 339 U.S. at 402. Indeed, the courts have found in a wide range of circumstances that government action short of prohibiting speech violated the First Amendment because it threatened to deter constitutionally protected speech.

In *Bantam Books*, for example, the Court struck down a Rhode Island law authorizing a commission to designate morally objectionable material and to educate the public about the material so designated. Rejecting the state's argument that the First Amendment was not violated because the Commission did not "regulate or suppress obscenity," the Court found that through "informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion and intimidation— . . . the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." 372 U.S. at 67. The Court noted that informal governmental actions can often deter protected speech even more effectively than formal governmental actions. It emphasized that because such "informal" sanctions were imposed through a system which provided "no safeguards whatever against the suppression of non-obscene, and therefore constitutionally protected, matter," they constituted "a form of regulation that creates hazards to protected freedoms *markedly greater than those that attend reliance upon the criminal law*." 372 U.S. at 70 (emphasis added).

Similarly, in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), the Court unanimously struck down a statute providing that when the Secretary of the Treasury determined mail to be "communist political propaganda," the

Postmaster General had to detain the mail and notify the addressee that it would be delivered only upon the addressee's written request. The Court explained that because of the official "condemnation" of the mail as "communist political propaganda," restricting access to this mail to those who affirmatively requested it was

almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. Public officials, like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have *condemned* as "communist political propaganda." (emphasis added).

381 U.S. at 307.⁴

For similar reasons, the Court has frequently struck down government imposed disclosure requirements. Although disclosure requirements do not directly restrict speech, the Court has struck down such requirements when they threatened to have a "deterrent and 'chilling' effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association. . . ." *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 557 (1963). See also *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 100 (1982) (names of campaign contributors and recipients of funds); *Talley v. California*, 362 U.S. 60 (1960) (ordinance requiring that names and addresses of authors of handbills be identified); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (disclosure of association's membership lists); cf. *American Communications Asso-*

⁴ As Justices Brennan, Goldberg and Harlan noted in their concurring opinions, "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government [citing cases]." *Lamont, supra*, 381 U.S. at 309.

ciation v. Douds, 339 U.S. 382, 402 (1950) (indirect "discouragements," such as hypothetical requirements that members of political parties wear identifying armbands, can suppress the exercise of First Amendment rights just as effectively as direct penalties).

Courts in many other contexts have struck down government action that did not prohibit speech, but nevertheless was found to be an impermissible deterrent to speech. As this Court explicitly noted in *Bantam Books, supra*, 372 U.S. at 67 n.8, the government's use of "informal sanctions" to condemn, but not prohibit, lawful speech has been found unlawful where the government made threats of prosecution, *New American Library of World Literature, Inc. v. Allen*, 114 F. Supp. 823 (N.D. Ohio 1953), threatened revocation of licenses, *Sunshine Book Co. v. McCaffrey*, 4 A.D.2d 643, 168 N.Y.S.2d 268 (1st Dept. 1957), or prepared and distributed lists of publications thought to be "pernicious literature," *HMH Publishing Co. v. Garrett*, 151 F. Supp. 903 (N.D. Ind. 1957), or lists of books otherwise considered "objectionable." *Bantam Books, Inc. v. Melko*, 25 N.J. Super. 292, 96 A.2d 47 (1953).

More recent decisions have recognized additional circumstances in which government action short of prohibiting speech impermissibly abridges First Amendment rights. See *Spiegel v. City of Houston*, 636 F.2d 997 (5th Cir. 1981) (officials recording adult motion pictures patrons' names); *Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir.), *cert. denied*, 447 U.S. 931 (1980) (local prosecutor's use of public announcements in local newspapers, systematic visits to retailers of magazines in question, and program of carefully timed warrantless arrests); *American Civil Liberties Union v. City of Pittsburgh*, 586 F. Supp. 417 (W.D. Pa. 1984) (Mayor's issuance of a letter through the media to local book and magazine distributors asking them to voluntarily terminate sale of publications and warning of criminal prosecutions); *Penthouse International Ltd. v. Putka*, 436 F.

Supp. 1220 (N.D. Ohio 1977) (use of contractual relationship to eliminate allegedly obscene publications from sale at municipal airport); *Hammond v. Brown*, 323 F. Supp. 326 (N.D. Ohio), *aff'd*, 450 F.2d 480 (6th Cir. 1971) (issuance of grand jury report accusing certain faculty members of conduct bordering on criminality for engaging in constitutionally protected speech); *Hentoff v. Ichord*, 318 F. Supp. 1175 (D.D.C. 1970) (blacklisting of "radicals" for purpose of causing public to bring social and economic pressures to bear on universities not to permit radicals to speak on campus); *Bee See Books, Inc. v. Leary*, 291 F. Supp. 622 (S.D.N.Y. 1968) (stationing uniformed policemen in adult bookstores); *Liveright v. Joint Comm. of the General Assembly of Tennessee*, 279 F. Supp. 205 (M.D. Tenn. 1968) (legislative committee investigation of allegedly "subversive" organization).

In short, it is settled that government action deterring constitutionally protected speech is not immunized from First Amendment scrutiny simply because it does not directly prohibit speech.

B. Government Action That Purposefully Suppresses Speech, Or Action That Is Tantamount To Government Condemnation Of Speech And Appears To Have The Force Of Government Behind It, Violates The First Amendment.

Despite the many occasions on which courts have considered the constitutionality of government action short of prohibition that deters protected speech, courts have resolved these disputes on a case-by-case basis without attempting to formulate broad rules distinguishing permissible and impermissible government action. This ad hoc approach is not surprising in view of the wide range of circumstances in which these cases arise and the need to consider carefully the context in which the governmental action is taken.⁵ These difficulties counsel against

⁵ For example, there has been substantial discussion in this case of the constitutional questions raised by "government speech." In

establishing a constitutional test intended to govern all such disputes.

Although it would be unwise and premature to articulate a precise and all-encompassing test for distinguishing between permissible and impermissible government action deterring speech, the caselaw does indicate that there are at least two identifiable circumstances in which such government action cannot be reconciled with the guarantees of the First Amendment. The clearest circumstance is when the very purpose of the government's action is to suppress constitutionally protected speech. *Bantam Books* teaches that just as the government cannot directly prohibit lawful speech, it must not indirectly but

fact, however, this is not a case in which concerns about "government speech" are central to the dispute. The "speech" aspects of the government's labeling action are minimal and probably no greater than the "speech" that necessarily attends most official government action.

It should be noted, however, that even to the extent this case can be viewed as a dispute about "government speech," the caselaw provides absolutely no support for the proposition that government speech is protected by the First Amendment. See *City of Boston v. Anderson*, 439 U.S. 160, *dismissing appeal from* 380 N.E.2d 628 (1978) (rejecting First Amendment claims of municipality); *Muir v. Alabama Educational Television Comm'n*, 688 F.2d 1033, 1044 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983); *Hentoff v. Ichord*, 318 F. Supp. 1175 (D.D.C. 1970) (enjoining Public Printer and Superintendent of Documents from publishing congressional report); *cf. Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933); Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEXAS L. REV. 863, 868 (1979). Indeed, the Court has repeatedly authorized judicially imposed restraints upon government speech, where the government speech threatens the private speech interests the First Amendment was designed to protect. See, e.g., *City of Boston v. Anderson*, *supra*; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (authorizing injunction against Commission's notices and letters); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (reversing dismissals of actions seeking deletion of plaintiffs' names from the Attorney General's list of communist organizations).

deliberately embark on a course of conduct designed to achieve the same end. See 372 U.S. at 67, 68. The Constitution does not tolerate such willful government efforts to exclude constitutionally protected speech from the marketplace of ideas.

Moreover, even when it cannot be shown that the government's purpose is to deter constitutionally protected speech, there are circumstances in which the government's action is so likely to have that effect, that the action cannot survive First Amendment scrutiny. A clear instance of such impermissible government action occurs when the action is tantamount to government "condemnation" of constitutionally protected speech and that condemnation appears to have the force of government behind it. *Lamont, supra*, 381 U.S. at 307.

The distinction between governmental disagreement with or criticism of private speech, on the one hand, and governmental "condemnation" of private speech, on the other, is an imprecise but important distinction. Governmental condemnation of private speech suggests that the private speech is so dangerous or utterly without merit that it is not worthy of serious consideration in the marketplace of ideas. When private speech is so labeled by the government, a substantial segment of the population will shun the private speech without any serious consideration of its merit, or of the merit of the governmental condemnation. Just as there are certain "fighting words" "which by their very utterance inflict injury or tend to incite an immediate breach of the peace"⁶ by the audience, regardless of the truth or falsity, merit or demerit, of those words, there are certain "buzz" words and labels which, when applied by the government to pri-

⁶ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1941). See also *Cantwell v. Connecticut*, 310 U.S. 296, 309-310 (1940): "Resort to epithets [even by private speakers] . . . is not in any proper sense communication of information or opinion safeguarded by the Constitution. . . ."

vate speech, will by their very utterance incite substantial public rejection of that private speech, regardless of the merit or demerit of the governmental condemnation. This public reaction is particularly likely when the governmental condemnation occurs, as is common, in a morally, politically or emotionally charged context, such as the government's use of the labels "obscene," "communist," "treason," or "political propaganda."

An official government act labeling constitutionally protected speech in a manner that is highly pejorative, or otherwise clearly indicating the government's official "condemnation" of that speech, is impermissible, as *Lamont* held, for very good reasons. When the government engages in such actions, it does more than simply enter the marketplace of ideas like any individual speaker; it brings to bear its augmented credibility, based on its assumed access to all relevant facts, its presumed neutrality, and its power of moral suasion, *quite independently of the persuasive strength of its ideas*. Substantial segments of the population are likely to shun materials condemned by the government as "political propaganda" without asking the government precisely what it meant by that label, or why that label was applied to the particular materials so labeled. In short, when the speaker is the government, many citizens are likely to be "persuaded" by the identity of the speaker, without regard to the independent strength or weakness of the speaker's ideas.

Moreover, because of the real and perceived power of government to affect the lives of citizens and to influence public opinion, government condemnation will give pause to individuals who are reluctant to risk disfavor of the government or the public. Thus, because of the "indirect coercive pressure" that such governmental judgments entail, the official application of highly pejorative labels such as "objectionable," "propaganda," or "disapproved," to constitutionally protected speech is hopelessly at odds

with the freedoms guaranteed by the First Amendment. See generally *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.31 (1978) ("Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves").

The *Lamont* decision recognized that official characterizations of this sort would inevitably cause citizens to avoid association with the speech condemned by the government. In *Lamont*, the government had precluded access to mail "condemned as 'communist political propaganda,'" unless a written request was made for the mail. 381 U.S. at 307. Despite appellants' suggestion to the contrary, the First Amendment concerns implicated by such condemnatory labeling are just as real in cases in which "written" association with the "political propaganda" is not required. Just as some public officials and other citizens are "almost certain" to fear associating themselves with "political propaganda" by requesting it in writing, 381 U.S. at 307, they will also fear associating themselves with "political propaganda" in any public context in which that association may become known to the government or others influenced by the government's condemnation.

In urging that the First Amendment does not permit the government to chill constitutionally protected speech in this way, *amici* do not suggest that government officials can never criticize private speech. But as *Lamont* recognizes, such criticism violates the First Amendment if it is not just criticism, but "condemnation" of the private speech, and if it occurs in circumstances where the official engaging in such conduct appears to condemn not just for himself, but to convey the added imprimatur of the authority and force of the government. Hence, if the action is taken pursuant to a specific command of Congress (or if the agent is otherwise in a position to act for the government, such as a public prosecutor), or if the agent's title, position or official power is such that the labeling will suggest *governmental condemnation*, and

thus will cause a substantial segment of the public to shun or reject the private speech without serious consideration of its merit, the action should be found to violate the First Amendment.

C. The Government Action At Issue In This Case Is Unconstitutional.

Application of these constitutional principles to the government action being reviewed in this case is not difficult. The action at issue represents both a deliberate government attempt to suppress constitutionally protected speech and a condemnatory labeling of speech that carries with it the authority and force of the government. As such, the government's action violates the First Amendment.

In granting summary judgment in favor of Senator Keene, the District Court expressly ruled that Congress intended to suppress speech when it adopted the challenged portions of the Foreign Agents Registration Act ("FARA"), 22 U.S.C. §§ 611(j), 614(a), (b) and (c). After reviewing the legislative history of FARA, the District Court determined that the Act was passed as a result of Congressional alarm "about the distribution within this country of materials it regarded as un-American, twisted, and pernicious." *Keene v. Meese*, 619 F. Supp. 1111, 1124 (E.D. Cal. 1985). It also found that:

[T]he legislative history considered as a whole makes it *abundantly clear* that Congress enacted the portion of FARA at issue in order to suppress or restrict that which it found abhorrent. Despite its employment of a wholly legitimate means to that end, Congress used the appellation, "political propaganda," which it understood and intended as a term of opprobrium, and by which it intended to discourage or suppress speech.

619 F. Supp. at 1124 (emphasis added). The intentional implementation of such a scheme by government officials is a patent violation of the First Amendment.

Moreover, even if this case did not involve government action intended to suppress speech, the government's application of the label "political propaganda" to constitutionally protected speech is tantamount to governmental condemnation of that speech. Based on extensive and uncontradicted evidence, the lower court found that the term "propaganda" is ordinarily understood as a word of reproach. This inescapable conclusion is amply borne out by the comprehensive discussion of this issue in the *amicus* brief in this case submitted by *amici* American Civil Liberties Union, *et al.*

The government seeks to avoid the common understanding of the phrase "political propaganda" by suggesting that the Act's definition of the phrase is not pejorative. This effort to mask the real effect of the government's classification is without merit. The undisputed facts indicate that in view of the common understanding of the phrase "political propaganda," the government's designation has understandably deterred Senator Keene's use of the film because of his concern that it might seriously tarnish his political career to become associated with films that are so designated.⁷ The presence of a so-called "neutral" definition in the statute⁸ does not allay these

⁷ The injury to Senator Keene demonstrates that the government's official (and public) application of condemnatory labels to constitutionally protected speech can deter the exercise of First Amendment rights regardless of whether the government's applications of such labels is widely known.

⁸ In suggesting that FARA defines the phrase "political propaganda" in a manner that is not pejorative, the government ignores both the purpose of the Act and the obvious implication of the statutory term. The lower court expressly determined from the legislative history that Congress intended to use the term pejoratively, *Keene, supra*, 619 F. Supp. at 1124, and this conclusion is strongly supported by the statutory scheme viewed as a whole.

Section 8 of the Act, 22 U.S.C. § 618, reveals that Congress hardly viewed "political propaganda" as innocuous (no matter how defined elsewhere in the Act), for it imposed serious criminal penalties on

concerns and would not alter the public's understanding of the meaning of the phrase unless the public was aware of the statutory definition.⁹

persons who distribute "political propaganda" if they do not comply with the detailed requirements of the Act. In addition to these criminal sanctions, the labeling sections of the Act strongly imply that the federal government disapproves of "political propaganda." In Section 4(b), 22 U.S.C. § 614(b), Congress provided that all "political propaganda" must be conspicuously labeled to state that the government's registration of foreign agents "does not indicate approval by the United States government of the contents of their political propaganda." The Department of Justice has conceded that labeling speech in this manner has "negative connotations" and has recommended that the Act be amended to use "more neutral language." J.A. 118. Notably, the Act contains no provision to discourage the common perception that a government designation of speech as "political propaganda" is intended pejoratively—a perception fueled by the labeling and other unusual requirements the Act imposes on this class of speech.

⁹ The absurdity of the government's contention is demonstrated by the following admittedly extreme hypothetical: Congress passes a statute requiring that a label stating that "THESE MATERIALS PROMOTE CHILD ABUSE" be placed on all writings that encourage people to educate their children at home, rather than in public schools or licensed private schools. The fact that the government's definition of the covered material pertains to activity viewed with far less disfavor than the label "CHILD ABUSE" ordinarily conveys would not render the label any less condemnatory for persons aware of the label but not aware of the statutory definition.

The government's suggestion that the consequences of awareness of the condemnatory label "political propaganda" can be ignored simply because the statute includes an allegedly neutral definition of that phrase ignores this Court's teaching in *Bantam Books* that "freedom of expression must be ringed about with adequate safeguards," 372 U.S. at 66, and government regulation of speech requires the use of "sensitive tools." 372 U.S. at 66 (quoting *Speiser v. Randall*, 357 U.S. 513 (1958)). Instead of legislating in a manner sensitive to First Amendment interests, Congress has employed a label which is commonly understood to be highly pejorative, and has done so even though the Department of Justice has conceded that any legitimate legislative purpose could adequately be served by "a more

It is also evident that the condemnatory labeling at issue in this case was backed by the authority of the government. It is undisputed that the classification in this case was performed by a governmental agency (the Criminal Division of the Department of Justice) pursuant to an express statutory authorization, making this a quintessential case of official government action.

Constitutionally protected speech should not be burdened by government action which labels it "political propaganda," and thereby suggests that it is unworthy of credence and impugns the motives of those who produce or distribute it. That is precisely what has happened in this case, pursuant to a congressional scheme purposefully designed to undermine and suppress a class of core political speech. *Amici* strongly urge the Court to hold that this government action is in violation of the First Amendment.

II. IF THE COURT REVERSES, IT SHOULD LIMIT ITS HOLDING TO THE PRECISE FACTS OF THIS CASE.

Amici have shown that the label "political propaganda" unduly deters private speech and violates the First Amendment. Should the Court disagree, however, and rule that the governmental action at issue in this case does *not* violate the First Amendment, that ruling should explicitly be limited to the facts of this case. Any broader or more open-ended ruling would encourage govern-

neutral term," such as political "advocacy" or "information," rather than the term political "propaganda." J.A. 118.

Given these concessions and the concessions noted in footnote 8 by the agency charged with implementation of this Act, it is clear that the government does not have a compelling need to use the pejorative phrase "political propaganda." Accordingly, in the circumstances of this case it is not necessary for the Court to determine whether a compelling governmental interest could save this otherwise unconstitutional abridgement of speech. See *Lamont*, *supra*, 381 U.S. at 308-309 (Brennan and Goldberg, J.J., concurring).

mental officials to apply pejorative labels in other contexts where such labeling *would* violate the First Amendment.

Case-by-case adjudication is the appropriate method for resolving constitutional issues, and that rule applies with particular force to adjudication of First Amendment issues. First Amendment freedoms are as fragile as they are precious, and courts have a special obligation not to "open the door" to possible violations of the First Amendment any wider than is absolutely necessary. *Roth v. United States*, 354 U.S. 476, 488 (1957).¹⁰

For that reason, if the Court rules that the governmental action at issue in this case does not violate the First Amendment, it should expressly reaffirm *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), and *Lamont v. Postmaster General*, 381 U.S. 301 (1965), and make clear that there are circumstances in which governmental "condemnation" of private speech, through pejorative labeling or otherwise, would violate the First Amendment.

Amici are plaintiffs in litigation currently pending in the United States District Court for the District of Columbia in which they challenge various actions of the Attorney General's Commission on Pornography on the ground that those actions were undertaken for the express purpose of "condemning," as "pornographic," speech published or distributed by *amici*, even though the Commission knew and later acknowledged that that

¹⁰ "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." (Footnotes omitted).

speech was not obscene and was constitutionally protected.¹¹ Despite the contrary holding in *Lamont*, the Commission argued that it could constitutionally "condemn" even lawful speech, through the use of a label the Commission conceded was "undoubtedly pejorative."¹² The Commission expressly relied upon *Block v. Meese*, 793 F.2d 1303 (D.C. Cir. 1986) in opposing injunctive relief. Although the District Court was bound by the Circuit Court's decision in *Block v. Meese*, the District Court ruled that the governmental condemnation at issue in the case before it could and probably did violate the First Amendment even if the governmental actions at issue in *Block v. Meese* (the use of the label "political propaganda") did not, and it therefore granted plaintiffs' request for preliminary injunctive relief. *Playboy Enterprises, Inc. v. Meese*, — F. Supp. — (D.D.C. 1986), 55 U.S.W.L. 2045.

Obviously, *amici* do not ask this Court to rule at this time that the actions of the Attorney General's Commission on Pornography violated the First Amendment, but they do ask the Court to recognize, as did the District Court for the District of Columbia, that governmental

¹¹ The Attorney General's Commission on Pornography Final Report (July 1986) (hereafter, "Commission Report") expressly acknowledges that *Playboy* Magazine is "plainly non-obscene." Commission Report at 271.

¹² The Commission had created the impression that *Playboy* Magazine is a "pornographic" magazine, and had threatened to list in its final report, as "identified distributors of pornography," bookstores and other retail stores that sold *Playboy*. The Commission knew and acknowledged that "the appellation 'pornography' is undoubtedly pejorative. To call something 'pornographic' is plainly, in modern usage, to condemn it. . . ." Commission Report at 228. The Commission also knew and acknowledged that "at some point governmental condemnation may act effectively as governmental restraint," citing *Bantam Books v. Sullivan*. Commission Report at 300 n.44 (emphasis in original). Nevertheless, the Commission claimed "both the right and the duty to condemn, in some cases, that which is properly constitutionally protected. . . ." *Id.*

condemnation of lawful speech can be found to violate the First Amendment, even if the governmental actions at issue in this case did not.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

SEP 15 1986

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CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

EDWIN MEESE III, ATTORNEY GENERAL OF THE
UNITED STATES, AND JOSEPH E. CLARKSON,
v. *Appellants,*

BARRY KEENE,
Appellee.

On Appeal from the United States District Court
for the Eastern District of California

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION,
MITCHELL BLOCK, AS PRESIDENT OF
DIRECT CINEMA LIMITED, INC.,
THE ENVIRONMENTAL DEFENSE FUND, INC.,
THE STATE OF NEW YORK,
THE BIOGRAPH THEATRE CORPORATION,
THE NEW YORK LIBRARY ASSOCIATION, AND THE
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<i>Block v. Smith</i> , 583 F. Supp. 1288 (D.D.C. 1984), <i>aff'd on other grounds sub nom. Block v. Meese</i> , 793 F.2d 1303 (D.C. Cir.), <i>cert. denied</i> , 106 S.Ct. 3335 (1986), <i>petition for reh'g pending</i> (filed July 25, 1986)	2, 3, 8, 9, 10, 15, 21, 25
<i>Brown v. Socialist Workers '74 Campaign Committee</i> , 459 U.S. 87 (1982)	5, 9, 17, 27
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	13, 14, 27
<i>Carey v. Brown</i> , 447 U.S. 455 (1980)	13
<i>Consolidated Edison Co. v. Public Service Commission</i> , 447 U.S. 530 (1980)	13, 14
<i>Duke Power Co. v. Carolina Environmental Study Group, Inc.</i> , 438 U.S. 59 (1978)	7, 11
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<i>FCC v. League of Women Voters</i> , 468 U.S. 364 (1984)	14
<i>First National Bank of Boston v. Bellotti</i> , 435 U.S. 765 (1978)	13, 19, 27
<i>Garrison v. Louisiana</i> , 379 U.S. 64 (1964)	13
<i>Joint Anti-Fascist Refugee Committee v. McGrath</i> , 341 U.S. 123 (1951)	7, 9, 17, 21
<i>Keene v. Smith</i> , 569 F. Supp. 1513 (E.D. Cal. 1983)	11, 25
<i>Keene v. Meese</i> , 619 F. Supp. 1111 (E.D. Cal. 1985), <i>probable jurisdiction noted</i> , 106 S.Ct. 1632 (1986)	5, 12, 25, 26, 29
<i>Laird v. Tatum</i> , 408 U.S. 1 (1972)	6
<i>Lamont v. Postmaster General</i> , 381 U.S. 301 (1965)	5, 13, 16, 26
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<i>United States v. SCRAP</i> , 412 U.S. 669 (1973)	8
<i>Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.</i> , 454 U.S. 464 (1982)	4
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28 C.F.R. § 5.401(d) (1985)	22
28 C.F.R. § 5.600 (1985)	22
<i>Legislative Material:</i>	
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<i>Books:</i>	
L. Doob, <i>Public Opinion and Propaganda</i> (1966)	24
T. Emerson, <i>The System of Freedom of Expression</i> (1970)	19, 20
B. & C. Evans, <i>A Dictionary of Contemporary American Usage</i> (1957)	23
L. Fraser, <i>Propaganda</i> (1957)	24
J. Fulbright, <i>The Pentagon Propaganda Machine</i> (1970)	24
<i>Funk & Wagnalls Standard College Dictionary</i> (1973)	23
<i>Harper Dictionary of Contemporary Usage</i> (1975)	23
H. Lasswell, <i>Propaganda Technique in the World War</i> (1938)	24
<i>Little Oxford Dictionary of Current English</i> (1962)	23
Martin, <i>International Propaganda: Its Legal and Diplomatic Control</i> (1969)	24
A. Meiklejohn, <i>Political Freedom</i> (1960)	14
W. & M. Morris, <i>Morris Dictionary of Word and Phrase Origins</i> (1977)	23
<i>The New Columbia Encyclopedia</i> (1975)	22
<i>Oxford Illustrated Dictionary</i> (1962)	23
R. Rotunda, J. Nowak & N. Young, <i>3 Treatise on Constitutional Law: Substance and Procedure</i> (1986)	19
L. Tribe, <i>American Constitutional Law</i> (1978)	20
<i>Webster's New World Dictionary</i> (2d ed. 1976) ..	23

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M. Yudof, <i>When Government Speaks: Politics, Law and Government Expression in America</i> (1983)	20, 24
<i>Periodicals:</i>	
Delgado, <i>The Language of the Arms Race: Should the People Limit Government Speech?</i> , 64 B.U.L. Rev. 961 (1984)	20
Kamenshine, <i>The First Amendment's Implied Political Establishment Clause</i> , 67 Calif. L. Rev. 1104 (1979)	20
Powell, <i>Towards a Negotiable Definition of Propaganda for International Agreements Related to Direct Broadcast Satellites</i> , 45 Law & Contemp. Probs. 3 (1982)	24
Shiffrin, <i>Government Speech</i> , 27 U.C.L.A. L. Rev. 565 (1980)	19
Van Alstyne, <i>The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes</i> , 31 Law & Contemp. Probs. 530 (1966)	14
Ziegler, <i>Government Speech and the Constitution: The Limits of Official Partisanship</i> , 21 B.C.L. Rev. 578 (1980)	19
<i>Newspapers:</i>	
New York Times:	
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Mar. 5, 1983, § 1, at 14, col. 5	10
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1180

EDWIN MEESE III, ATTORNEY GENERAL OF THE
UNITED STATES, AND JOSEPH E. CLARKSON,
v. *Appellants,*

BARRY KEENE,
Appellee.

On Appeal from the United States District Court
for the Eastern District of California

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION,
MITCHELL BLOCK, AS PRESIDENT OF
DIRECT CINEMA LIMITED, INC.,
THE ENVIRONMENTAL DEFENSE FUND, INC.,
THE STATE OF NEW YORK,
THE BIOGRAPH THEATRE CORPORATION,
THE NEW YORK LIBRARY ASSOCIATION, AND THE
ENVIRONMENTAL TASK FORCE, INC., *AMICI CURIAE*,
IN SUPPORT OF APPELLEE

INTEREST OF *AMICI CURIAE*

Amicus American Civil Liberties Union is a nationwide nonpartisan organization of over 250,000 members, dedicated to the protection of the civil rights and civil liberties guaranteed by the Constitution. Amici Mitchell Block, President of Direct Cinema Limited, Inc., the State of New York, the Environmental Defense Fund, Inc., the Environmental Task Force, Inc., the New York Library Association, and the Biograph Theatre Corporation are

distributors or exhibitor-sponsors of the three Canadian films at issue here. In a separate action styled *Block v. Smith*, 583 F. Supp. 1288 (D.D.C. 1984), *aff'd on other grounds sub nom. Block v. Meese*, 793 F.2d 1303 (D.C. Cir.), *cert. denied*, 106 S. Ct. 3335 (1986), *petition for reh'g pending* (filed July 25, 1986), they challenged the government's statutory and constitutional authority to designate the films as political propaganda. The ACLU litigated the *Block* case on behalf of the plaintiffs. The District of Columbia Circuit held that the *Block* plaintiffs had standing on the ground of economic injury, but ruled for the government on the merits of the case.

This case presents the extraordinary claim by the government that it may, pursuant to the Foreign Agents Registration Act, officially and publicly brand these Canadian films as foreign political propaganda, even though exhibition of the films is deterred and Americans are less able to receive protected expression as a result. The Solicitor General contends that the government's action must be tolerated because Congress has defined the term "propaganda," commonly understood as highly pejorative, in a neutral fashion. Both the ACLU, which has always been especially active in defense of freedom of expression, and the *Block* plaintiffs, who sought to protect their own First Amendment rights to exhibit these films free from government interference, have a strong interest and special expertise in the issues raised by this case. Because we believe that the serious constitutional issue presented would properly be resolved by a decision affirming the district court's judgment in *Keene*, we submit this brief *amici curiae*.

SUMMARY OF ARGUMENT

I. Senator Keene faces imminent and palpable injury as the direct result of the government's action in classifying as "political propaganda" three Canadian films he wishes to exhibit. He therefore has standing to challenge the constitutionality of the classification requirement of

the Foreign Agents Registration Act ("FARA"). The uncontroverted evidence shows that the official classification of these films as propaganda will impair Senator Keene's ability effectively to communicate his political views, by causing the public to disregard or discredit the content of the films. Furthermore, Senator Keene has presented affirmative and un rebutted evidence of threatened injury to his reputation. His political and legal careers, and his stature in the community, would likely be damaged if he were viewed as a promoter of political propaganda. Injury to reputation has long been recognized as substantial and properly confers standing here. The significant injuries confronting Senator Keene are fairly traceable to the statutory classification scheme. As both the district court here and the court of appeals in *Block v. Meese* recognized, the negative reaction the propaganda classification induces in the public mind establishes a de facto causal connection between the classification and injury, notwithstanding the statutory definition of "propaganda."

II. The "political propaganda" classification of the Canadian films is a content-based regulation of core political speech, and invokes the highest degree of concern for First Amendment values. Indirect government manipulation to suppress expression is no less constitutionally suspect than direct censorship, as this Court has often recognized. Government imposition of a pejorative classification on protected speech through a regularized bureaucratic process, authorized by act of Congress, poses a serious threat to self-government, and is not comparable to an expression of the personal views of individual public officials. Here, the government's action results in distortion of public opinion due to the negative connotations generated by use of the term "propaganda" to describe political advocacy, and speech is thereby abridged in practice. What the government has done, through the propa-

ganda classification process, is broadly to sweep in all political advocacy on behalf of various foreign interests, regardless of its actual nature, and stamp it with a label generally understood—even if not actually intended—to be pejorative. The statutory definition, regardless of its neutrality, thus has no bearing on the constitutional vice of the scheme. The only legitimate purpose Congress sought to advance by the classification, and the only one relied on by the government here, is disclosure of the source of materials disseminated by foreign agents. This interest would be fully served by means less restrictive of First Amendment rights than the propaganda designation, as the government has itself recognized. Given the purely gratuitous damage that the government's action causes, the FARA "political propaganda" classification violates the First Amendment, on its face and as applied to these films.

ARGUMENT

I. SENATOR KEENE HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE CLASSIFICATION REQUIREMENT OF THE FOREIGN AGENTS REGISTRATION ACT.

The district court correctly found that Senator Keene alleged and proved that he has standing to challenge the constitutionality of the classification requirement of the Foreign Agents Registration Act of 1938, 22 U.S.C. §§ 611-621 (1982 & Supp. II 1984) ("FARA"). A plaintiff is required to allege a "personal stake in the outcome of the controversy," consisting of a "distinct and palpable injury" that is "fairly traceable" to the challenged conduct, *Larson v. Valente*, 456 U.S. 228, 238-39 (1982) (citations omitted), and that is redressable by the court, *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Senator Keene has satisfied these requirements.

A. Senator Keene Has Demonstrated Injury in Fact from the Application of FARA to the Films He Intends to Exhibit.

Senator Keene has offered uncontroverted evidence of a distinct and palpable injury.¹ The official classification of Senator Keene's speech as "political propaganda," effectively denigrating the content of his message and his credibility as a speaker, will both impair his ability to communicate and injure his reputation. Senator Keene is not a commercial distributor with purely financial incentives for handling the films; the public is particularly likely to identify the foreign "political propaganda" with Senator Keene's own political views, and to conclude that he adheres to unpatriotic positions.

The official classification of Senator Keene's speech impairs his ability to communicate his ideas to others—a right central to the First Amendment. See *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring); *Thomas v. Collins*, 323 U.S. 516, 534 (1945); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). Where parties have properly alleged governmental interference with their constitutional rights to disseminate or receive expression, this Court has permitted the government's action to be challenged without question. See, e.g., *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 98 (1982) (disclosure requirements could reduce free circulation of ideas); *Young v. American Mini Theatres*, 427 U.S. 50, 78 (1976) (Powell, J., concurring) (First Amendment injury exists where viewing of films restricted in "any significant way"); *Lamont v. Postmaster General*, 381 U.S. 301, 305-07 (1965). Senator Keene has not only alleged but also offered uncon-

¹ *Keene v. Meese*, 619 F. Supp. 1111, 1117 (E.D. Cal. 1985) (Jurisdictional Statement Appendix ["J.S. App."] 8a), probable jurisdiction noted, 106 S. Ct. 1632 (1986) ("[D]efendants have failed to counter, by affidavit or otherwise, the declarations filed by the plaintiff tending to demonstrate the existence of standing.").

troverted expert testimony demonstrating an impaired ability to communicate his political views.² Since the official classification of "political propaganda" suggests that the information contained in these films is untrustworthy, the public is unlikely to lend it any credence.³

Senator Keene has also presented affirmative evidence of injury to his reputation. By becoming known as an exhibitor of films officially classified by the government as foreign "political propaganda," he will suffer injury to his reputation as a citizen, lawyer and political figure, and consequently suffer personal, economic and political loss.⁴ Damage to reputation has long been recognized as

² See Joint Appendix ("J.A.") 108 (Declaration of Edwin Newman, ¶ 3) ("[C]alling something propaganda amounts, for all practical purposes, to saying that it is not worth considering, that it is to be dismissed."); J.A. 103 (Declaration of Leonard W. Doob, ¶ 9) ("It is my professional judgment that knowledge of [the political propaganda] designation would be extremely likely to deter persons from viewing or reading such materials and diminish and/or slant its communicative value, in a manner likely to make the reader suspicious of the material, far less likely to credit it or accept its conclusions.").

³ The government's reliance on *Laird v. Tatum*, 408 U.S. 1 (1972), misconceives Senator Keene's argument. In *Laird*, the Court rejected plaintiffs' standing allegations consisting of "the chilling effect aris[ing] merely from the individual's knowledge that a governmental agency was engaged in certain activities [and] from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some *other* and additional action detrimental to that individual." 408 U.S. at 11 (emphasis in original). Senator Keene, by contrast, is not asserting standing based merely on his knowledge of governmental activity or fear of possible future action by the government. Senator Keene is asserting that the government's act of classifying these films will discredit his speech and dissuade any potential audience from giving any credence to its content.

⁴ See J.A. 69 (Declaration of Mervin D. Field, ¶ 5) (Gallup poll indicates serious "adverse effect" from charge that a candidate had exhibited films officially classified as political propaganda); J.A. 37

a legal injury and thus, as the government concedes, Brief for Appellants at 14, it constitutes injury in fact for standing purposes. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 139-41 (1951) (opinion of Burton, J.); *id.* at 143 (Black, J., concurring); *id.* at 157-60 (Frankfurter, J., concurring); *id.* at 174-75 (Douglas, J., concurring); see also *Owen v. City of Independence*, 445 U.S. 622, 633 & n.13 (1980); *Wisconsin v. Constantineau*, 400 U.S. 433, 435-37 (1971); *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

Moreover, what is important is not the type of injury alleged, but the showing of a personal stake in the outcome "to assure that concrete adverseness which sharpens the presentation of issues." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978). "Injury in fact" . . . serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at

(Declaration of David I. Freed, ¶ 10) ("I view these consequences [of FARA] as diminishing the credibility and reputation of the firm in general; as casting upon the firm (as well as [Senator Keene]) an aura of diminished patriotism; and as impeding . . . the firm's ability to accomplish the goals and benefits for our clients that might be otherwise obtained without a government mandated 'unsavory association.' In particular, many of our clients would have severe misgivings if a member of this firm were 'associated' with the representation of the foreign principals."); J.A. 30 (Declaration of Harry Bistrin, ¶ III) ("North Coast voters have developed a noticeable animosity towards competing foreign interests and those who are perceived as advocating 'un-American' interests."); J.A. 39 (Declaration of Donald T. Peterson, ¶ 12) ("[I]t is my opinion that Senator Keene's re-election chances could be harmed substantially should a political opponent be able to associate the Senator with 'foreign political propaganda.'"); J.A. 101 (Declaration of Leonard W. Doob, ¶ 3) ("[I]t is my judgment that the designation 'political propaganda' of a film or book by the government is pejorative, denigrating to the material, and stigmatizing to those disseminating it.").

stake in the outcome of an action than a fraction of a vote, a \$5 fine and costs, and a \$1.50 poll tax." *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973) (citations omitted).

Senator Keene has a substantial personal stake, not merely an abstract concern, in the outcome of this litigation. Far from alleging a generalized grievance, Senator Keene has alleged injury that distinguishes him from the ordinary citizen, voter or taxpayer. The films he, personally, intends to exhibit have been officially branded "political propaganda." The statute is being applied to his intended vehicle of free expression. *Cf. Larson*, 456 U.S. at 241. Thus, Senator Keene is forced to choose between declining to exercise his right to speak and suffering injury to his livelihood, stature and First Amendment interests.

B. The Threatened Injuries Are Fairly Traceable to the Existence and Application of FARA and Are Redressable by the Court.

The threat of injury to Senator Keene's ability to communicate and to his reputation is fairly traceable to the existence and application of FARA. The government contends that any injury to Senator Keene's reputation is speculative, and attributable solely to the actions of third parties because of the neutral statutory definition. However, "constitutional injury-in-fact . . . requires no more than de facto causality." *Block v. Meese*, 793 F.2d at 1309. But for the existence of the official branding of these films as "political propaganda," the threat of this injury would not exist. The causal chain is clear and logical: the films are classified, the public becomes aware of the classification,⁵ and Senator Keene's ability to communicate and his reputation are injured.

⁵ See Department of Justice Press Release #202-633-2007 (Feb. 25, 1983). This document was included in the Joint Appendix in *Block v. Meese* at 248, and is attached hereto as Appendix A.

Senator Keene has offered empirical data demonstrating the public's reaction to the government's classification of the films.⁶ Contrary to the government's assertion, see Brief for Appellants at 15, the involvement of "subjective impressions of third parties" does not disrupt the causal nexus between the government's conduct and Senator Keene's threatened injury. See *Joint Anti-Fascist Refugee Committee*, 341 U.S. at 141; *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. at 97-98 (First Amendment injury through public hostility and suspicion). As Judge Scalia explained in *Block v. Meese*:

It is impossible to maintain, of course, that there is no standing to sue regarding action of a defendant which harms the plaintiff only through the reaction of third persons. If that principle were true, it is difficult to see how libel actions or suits for inducing breach of contract could be brought in federal court; or, to use a more proximate analogy, how state threats and intimidation directed at the distributors of certain books could confer standing upon the publisher whose sales are affected, see *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963).

793 F.2d at 1309.

Furthermore, whether the public has misinterpreted the "political propaganda" classification is irrelevant to the cause in fact connection. As the court of appeals stated in *Block*:

⁶ See J.A. 78-98 (Declaration of Leonard Wood, setting forth results of Gallup study); J.A. 68-69 (Declaration of Mervin D. Field, analyzing results of Gallup study); see also J.A. 31 (Declaration of Ed Canapary) ("In my opinion, a research survey could be developed to measure . . . voter perception. . ."); J.A. 37 (Declaration of David I. Freed, ¶ 11) ("I will not sacrifice the reputation of this firm or its clients. So long as the federal government requires that the subject films be registered and labeled as foreign propaganda, I will impose the requirement as a condition of future employment, that the plaintiff forebear from exhibiting the subject films.").

Whether the public has been irrational in interpreting the "political propaganda" classification as a judgment that these films are biased or unAmerican seems to us no more relevant to the issue of standing in [*Block*] than it was relevant to the issue of standing in *NAACP v. Alabama*, 357 U.S. 449, 463 (1958), whether the citizens of Alabama were irrational in their reaction to membership in the NAACP.

793 F.2d at 1309.

The government's other arguments relating to the lack of a causal nexus are equally unfounded. The government seems to imply that the likelihood of the public being aware of the "political propaganda" classification is slim. Brief for Appellants at 15. Senator Keene, however, has offered uncontroverted evidence indicating how readily this information could be used against him, in light of his political position.⁷ Furthermore, there can be no serious question that the general public in fact became aware of the propaganda classification of these films, which was widely reported in the media.⁸

⁷ See J.A. 30 (Declaration of Harry Bistrin, ¶ IV) ("I have no doubt but that some members of the North Coast press, present political adversaries, and future opponents, would openly seize upon the opportunity to utilize the government's reporting, dissemination and label requirements under FARA to their benefit by portraying the plaintiff as a disseminator of 'foreign political propaganda'"); J.A. 40 (Declaration of Donald T. Peterson, ¶ 13) ("One potential tactic could take the form of a mailer in the last days of the campaign—allowing little or no opportunity for response—reprinting any U.S. government document or news story that showed particular films to be classified as 'propaganda.'").

⁸ Our research has revealed 99 newspaper and magazine stories discussing the propaganda classification of these films prior to the filing of Senator Keene's complaint on March 24, 1983. The New York Times alone covered the controversy in ten articles. N.Y. Times, Mar. 18, 1983, § C, at 8, col. 1; *id.*, Mar. 6, 1983, § 4, at 18, col. 1; *id.*, Mar. 5, 1983, § 1, at 14, col. 5; *id.*, Mar. 3, 1983, § A, at 27, col. 1; *id.*, Feb. 27, 1983, § 4, at 2, col. 2; *id.*, Feb. 26, 1983, § 1, at 3, col. 5; *id.*, Feb. 26, 1983, § 1, at 16, col. 5; *id.*, Feb. 26, 1983,

Moreover, as the government has pointed out, see Brief for Appellants at 22-27 & nn.19, 20, 22, the express purpose of FARA, through requiring public disclosure, was to insure public awareness of the origin of the materials classified as political propaganda.⁹ FARA provides: that copies of political propaganda be available for public inspection, 22 U.S.C. § 614(c) (1982); that the political propaganda be conspicuously marked with information regarding its source, 22 U.S.C. § 614(b) (1982); and that the dissemination statement be available for public inspection, 22 U.S.C. § 616(a) (1982). The dissemination reports, which list the names of all stations, organizations or theaters using the film, are maintained on public file and clearly identify the material as "propaganda." J.A. 16-17 (U.S. Department of Justice Form CRM-159.)¹⁰

Finally, there can be no question that the threatened injury is judicially redressable. If the government is permanently enjoined from designating these films as political propaganda, the threat of injury to Senator Keene would disappear. See *Duke Power Co.*, 438 U.S. at 75 n.20. Senator Keene, therefore, has standing to seek vindication of the violation of his constitutional rights.

§ 1, at 22, col. 1; *id.*, Feb. 25, 1983, § B, at 1, col. 1; *id.*, Feb. 25, 1983, § C, at 4, col. 5.

⁹ See 22 U.S.C. § 611 note at 161 (purpose of Act to inform "the people of the United States" of the identity of "persons engaging in propaganda activities and other activities for or on the behalf of foreign governments" so that the public "may appraise their statements and actions in the light of their associations and activities").

¹⁰ While the government has stated that appellee is not required to be listed on the dissemination form and that appellee may remove the label, see J.A. 22, 65; *Keene v. Smith*, 569 F. Supp. 1513, 1519 n.2 (E.D. Cal. 1983) (J.S. App. 55a), these agency interpretations do not purport to alter the general statutory scheme to inform the public. Indeed, the classification of the films themselves remains freely available public information.

II. THE GOVERNMENT'S CLASSIFICATION OF THE CANADIAN FILMS AS "POLITICAL PROPAGANDA" VIOLATES THE FIRST AMENDMENT.

If the particular question presented in this case is "novel," *Keene v. Meese*, 619 F. Supp. 1111, 1120 (E.D. Cal. 1985) (J.S. App. 16a), *probable jurisdiction noted*, 106 S. Ct. 1632 (1986), the First Amendment principles at stake are not; they are firmly rooted in our system of democratic government. "[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Here, the Attorney General, acting under the authority of FARA, a statute enacted by Congress to promote disclosure of the identities of foreign agents, has publicly classified three Canadian films dealing with the subjects of acid rain and nuclear war as "political psopaganda." The subject matter of these films is clearly at the core of the First Amendment's protection, and, as shown above and recognized by the district court, the government's action in fact makes these films less available to American citizens who wish to receive them. As the district court determined, the government has abridged plaintiff's freedom of speech within the meaning of the First Amendment. *Keene v. Meese*, 619 F. Supp. at 1124-26 (J.S. App. 23a-27a).

The government implicitly concedes that it has no power formally to restrict dissemination of the Canadian films. Instead, it takes the position that the effect of the classification is exempt from First Amendment scrutiny because the Congressional definition of "political propaganda" in FARA does not expressly denigrate speech so labeled. Alternatively, in the government's view, even if the "political propaganda" classification does express official disapproval of speech, Congress has the power to require such labeling in order to carry out FARA's disclosure purpose. Neither of these arguments

can withstand analysis. First Amendment values are offended not only by formal censorship, but also by indirect devices that tend, in practice, to limit freedom of discussion on public issues. And the government has altogether failed to demonstrate that the FARA classification scheme serves any governmental purpose that cannot be achieved by less restrictive means. Accordingly, the FARA propaganda classification requirement is unconstitutional.

A. FARA's "Political Propaganda" Classification Is a Content-Based Regulation of Core Political Speech.

The government's power is subject to the greatest constitutional constraints when it seeks to obstruct dissemination of the type of speech regulated under FARA. FARA's classification scheme, 22 U.S.C. § 611(j) (1982), is directed at core "political" speech, which "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey v. Brown*, 447 U.S. 455, 467 (1980). This Court has been most zealous in scrutinizing government regulation of political speech, for limitation on the freedom to debate public issues threatens the self-government for which the Constitution was created. As recognized in *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964), "speech concerning public affairs is more than self-expression; it is the essence of self-government." See also *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 & nn.11-12 (1978); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). Nor does it matter that this case concerns speech originally emanating from Canada. As *Lamont v. Postmaster General*, 381 U.S. 301, establishes, American citizens clearly have a right to receive foreign speech.¹¹ Congress has no power

¹¹ "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source. . . ." *First National Bank of Boston*, 435 U.S. at 777. Accord, *Pacific Gas & Electric Co. v. Public Utility Comm'n*, 106 S. Ct. 903, 907 (1986); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 533 (1980).

to abridge speech merely because it emanates from abroad, for foreign speech is valuable to domestic political debate. See A. Meiklejohn, *Political Freedom* 119 (1960).¹²

Nor is FARA's "political propaganda" classification, based upon the content of political speech, in any respect comparable to neutral time, place and manner regulations. The statutory definition applies to expression intended or reasonably adapted to "prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient" with respect to a variety of foreign political interests. 22 U.S.C. § 611(j). Thus, whether speech is deemed "propaganda" turns on its intent or design to persuade, but the First Amendment extends no less protection to "vigorous advocacy" than "abstract discussion." *Buckley v. Valeo*, 424 U.S. at 48.

In order to determine whether particular speech is "propaganda" under FARA, government officials must necessarily examine its content. Yet "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). This Court recently determined that a government ban on "editorializing" by noncommercial broadcast stations was content-based because it was necessary to determine whether "controversial issues of public importance" were presented. *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984). It refused to look only at whether Congress had sought to regulate views of "one particular ideological bent." *Id.* at 407 (Rehnquist, J., dissenting). See also *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 537 (1980) (the First Amend-

¹² See also Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes*, 31 Law & Contemp. Probs. 530, 536-40 (1966).

ment's hostility to content-based regulations does not extend only to "restrictions on particular viewpoints").

B. Classification of These Films as "Political Propaganda" Abridges Plaintiff's First Amendment Rights.

1. Systematic official classification of protected speech as "political propaganda" is a form of government action subject to First Amendment constraints.

A disparaging legal classification imposed on core political speech simply cannot be dismissed as an innocuous expression of opinion. FARA's classification scheme constitutes official action pursuant to the laws of the United States, and is readily distinguishable in its nature and effect from the voice of any individual speaker, whether private citizen or government official. Where such official action operates to restrain speech by its manipulation of public opinion, it contravenes the First Amendment.

In *Block v. Meese*, the court of appeals upheld the FARA classification scheme on the ground that, even if the label "political propaganda" amounted to official disapproval, any limit on the government's power to engage in "ideological debate" would be neither practicable nor desirable. 793 F.2d at 1312-14. The court contended that any form of government criticism of private expression was permissible, so long as ideas were not suppressed through the "exercise or threat of state power," *id.* at 1314. As we show below, the court in *Block* took an unjustifiably narrow view of governing First Amendment doctrine.

Freedom of discussion of public issues is impaired if government is allowed unrestricted power to brand political expression as propaganda, even though disfavored ideas are not formally censored. Numerous decisions of this Court have found indirect restraints on speech un-

constitutional in order to prevent a burden on the practical exercise of First Amendment rights. In *Lamont*, the Court unanimously held the First Amendment violated by a statutory requirement that an addressee to whom "communist political propaganda" had been sent request receipt of the material in writing:

This requirement is almost certain to have a deterrent effect . . . [a]ny addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as "communist political propaganda." The regime of this Act is at war with the "uninhibited, robust and wide-open" debate and discussion that are contemplated by the First Amendment.

381 U.S. at 307 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), the Court, recognizing that "[i]t is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging but barely visible encroachments," *id.* at 66, overturned a state law authorizing a commission to designate morally "objectionable" materials. Rejecting the state's argument that it was merely educating the public, the Court determined that the commission, though limited to "informal sanctions," had deliberately set about to suppress disfavored publications, and that such "informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief." *Id.* at 67.

While the government seeks to distinguish *Lamont* and *Bantam Books* as examples of "concrete action" by government, Brief for Appellants at 36, neither the requirement of a written request to have mail delivered in *Lamont*, nor the sending of a letter notifying distributors of the classification and possible consequences in *Bantam Books* suppressed speech of their own force. Instead, they were deemed unconstitutional because the classifications would give rise to hostile actions by others, and

result in the limitation of speech in practice. Similarly, in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, the Court overturned the Attorney General's designation of particular organizations as "Communist"; Justice Burton's opinion declared that "[w]e long have granted relief to parties whose legal rights have been violated by unlawful public action, although such action made no direct demands upon them," *id.* at 141. See also *id.* at 142 (Black, J., concurring).

Many other decisions establish that government action short of overt censorship—and in particular action directing the formidable pressure of public opinion against disfavored views—can abridge expression. Organizations have been held immune from government disclosure requirements—despite the absence of any direct restriction on speech, and even where those requirements would otherwise be lawful—because disclosure would constitute an "effective" restraint on First Amendment rights owing to "public hostility," *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (membership lists), or expose individuals associating with the organization to "threats, harassment, and reprisals." *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 100 (names of campaign contributors and recipients of funds). In *Talley v. California*, 362 U.S. 60 (1960), an ordinance requiring that the names and addresses of authors of handbills be identified was held unconstitutional because "[t]here can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression," owing to the need for disfavored groups to preserve their anonymity against reprisals. *Id.* at 64. See also *American Communications Association v. Douds*, 339 U.S. 382, 402 (1950) (indirect "discouragements," such as hypothetical requirement that members of political parties wear identifying armbands, have same coercive effect on First Amendment rights as direct penalties).

The need for special scrutiny of government classifications likely to distort public opinion was made evident in *Anderson v. Martin*, 375 U.S. 399 (1964), which held unconstitutional under the equal protection clause of the Fourteenth Amendment a state requirement that the race of candidates for elective office be designated on the ballot. *Anderson* established that it would be improper for the government to distort the political process by a racial classification tending to induce negative public reactions, even though individual voters would themselves be free to exercise their franchise on the basis of race or any other factor:

[By] placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another . . . [t]he vice lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls. *Id.* at 402.

Similarly, the government has no right, as a matter of First Amendment principle, officially to classify and derogate particular categories of political speech, thereby distorting debate on public issues.

An official classification of the sort mandated by FARA, like the racial classification in *Anderson*, is properly regarded as an example of government action, subject to constitutional constraints. The process of self-government demands that ideas and opinions on public issues be able to compete freely, without official condemnation or prejudgment. “[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Jackson, in *Thomas v. Collins*, 323 U.S. 516 (1945), reaffirmed that “it cannot be the duty, be-

cause it is not the right, of the state to protect the public against false doctrine.” *Id.* at 545 (concurring opinion). Our political system presumes that the people hold the ultimate authority over the government, and the First Amendment ensures that they retain the freedom to determine how that authority shall be exercised. “The maintenance of the opportunity for free public discussion to the end that government may be responsive to the will of the people . . . is a fundamental principle of our constitutional system.” *Stromberg v. California*, 283 U.S. 359, 369 (1931). For this reason, “[g]overnment is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves.” *First National Bank of Boston*, 435 U.S. at 791 n.31.

The fundamental distinction between speech about government and government speech has been understood since the beginnings of our Republic. James Madison observed, “If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.” 3 *Annals of Congress* 934 (1794). Modern scholars, while differing over the proper role of government speech in a democratic system, generally recognize that it is properly subject to some limitations—even though such restraints would be unconstitutional were they invoked by the government against private political speech.¹³ Indeed, the most comprehensive anal-

¹³ Commentators frequently express concern about distortion of the political process as the result of government speech. See, e.g., R. Rotunda, J. Nowak & N. Young, 3 *Treatise on Constitutional Law: Substance and Procedure* § 20.11 at 40 (1986); Shiffrin, *Government Speech*, 27 U.C.L.A.L. Rev. 565 (1980); Ziegler, *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C.L. Rev. 578 (1980); T. Emerson, *The System of Freedom of Expression* 699 (1970) (“The government’s right of expression does not extend to any sphere that is outside the government function. . . . It is not the function of the government to get itself reelected.”). Government speech may be employed to falsify political consent and ensure perpetuation of established policies. See,

ysis of government speech observes that "[t]he First Amendment has been viewed historically as involving limitations on government, not as a source of government rights. . . . [I]t is inconceivable that governments should assert First Amendment rights antagonistic to the interests of the larger community." M. Yudof, *When Government Speaks: Politics, Law and Government Expression in America* 44-45 (1983).

Official branding of films as political propaganda, pursuant to statute, is not comparable to ordinary expression by public officials.¹⁴ The court of appeals in *Block* mistakenly assumed that these forms of expression would

e.g., Delgado, *The Language of the Arms Race: Should the People Limit Government Speech?*, 64 B.U.L. Rev. 961 (1984). And even where government speech is assumed to have some legitimate role, the risk that it could overpower individual expression is often noted. *See, e.g.*, L. Tribe, *American Constitutional Law* 590 (1978); T. Emerson, *The System of Freedom of Expression* 698. One scholar proposes recognition of an "implied political establishment clause," analogous to the First Amendment's prohibition on establishments of religion, in order to prevent government manipulation of political debate. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 Calif. L. Rev. 1104 (1979).

¹⁴ Government speech can have a "special impact on the system . . . substantially different from that of private expression. A major example of this is the effect of government expression used to deter or suppress private expression. Most commonly it takes place when the government expression hints at or threatens official reprisals against persons or groups holding views in conflict with official policy; or when the government expression arouses hostility in the community against certain opinions and thereby brings private economic or social pressures to bear against those who espouse the unpopular position. . . . Communications of a similar nature emanating from private persons or groups would ordinarily be acceptable, in fact a routine feature of the system. Coming from the government, however, such expression takes on a different character. It becomes for all practical purposes an informal sanction against private dissenting expression, often equivalent in its effects to a formal sanction." T. Emerson, *The System of Freedom of Expression* 699-700 (emphasis added).

prove indistinguishable, 793 F.2d at 1313-14. Individual government officials, of course, retain all the First Amendment rights they enjoyed as private citizens. The Constitution is not offended by the greater attention their views receive as a result of their positions. When a government official expresses his personal opinion on political questions, and it is understood by the public as such, he contributes to the process of debate that is essential to self-government. At the other end of the spectrum is a classification imposed by act of Congress and administrative officials acting pursuant to Congress' direction. This distinction is apparent in the context of *Anderson v. Martin*. What any incumbent public officer or challenger might have done in the course of his speeches, with the full protection of the First Amendment, the government could not do—intrude into the political process with a racial classification and thereby suggest that voters should consider race a relevant factor. Justice Douglas, discussing the classification of particular organizations as Communist in *Joint Anti-Fascist Refugee Committee*, made the same point:

This is not an instance of name calling by public officials. This is a determination of status. . . . This determination has consequences that are serious to the condemned organizations. Those consequences flow in part, of course, from public opinion. But they also flow from actions of regulatory agencies that are moving in the wake of the Attorney General's determination to penalize or police those organizations.

341 U.S. at 175 (Douglas, J., concurring) (footnote omitted). As in the the situation described by Justice Douglas, a variety of consequences flow from the FARA classification that would not be encountered were any individual public official, even the President, to be expressing personal opinions.¹⁵

¹⁵ Agents of foreign principals must mark any material designated "political propaganda" with an identification statement, the

2. *The government's classification of the Canadian films pursuant to FARA burdens protected speech because of the common pejorative usage of "propaganda."*

Official and public government classification of particular films and other materials as "political propaganda" clearly has an impact on expression protected by the First Amendment. The term "propaganda," as used in ordinary discourse, necessarily bears a negative connotation. The government, in its blinkered focus on the statutory definition of "propaganda" in 22 U.S.C. § 611(j), fails to appreciate that the injury to protected speech, and abridgment of First Amendment rights, arises from the ordinary public reaction to governmental use of this term.

Common sense and the uncontradicted record demonstrate the pejorative and stigmatizing effects of describing political expression as "propaganda," a word which in this century has come to signify "systematic manipulation of public opinion,"¹⁶ in order to mislead recipients for ulterior motives.¹⁷ The negative connotations of

form of which is prescribed by the statute, 22 U.S.C. § 614(b), and must file dissemination reports with the Attorney General, 22 U.S.C. § 614(a); 28 C.F.R. § 5.401(d) (1985) containing the names of organizations requesting the material. This information is kept on public file at the Department of Justice. 22 U.S.C. § 616(a); 28 C.F.R. § 5.600 (1985).

¹⁶ *The New Columbia Encyclopedia* 2225 (1975).

¹⁷ Leonard W. Doob, Sterling Professor Emeritus of Psychology at Yale University and a recognized authority on propaganda, has testified that:

[I]t is my judgment that the designation "political propaganda" of a film or book by the government is pejorative, denigrating to the material, and stigmatizing to those disseminating it. . . . [T]o call something propaganda is to assert that it communicates hidden or deceitful ideas; that concealed interests are involved; that unfair or insidious methods [are] being employed; that its dissemination is systematic and organized in

"propaganda" are widely understood in common usage.¹⁸ American presidents regularly describe the activities of

some way which distinguishes it from, for example, the simple release of films or magazines in this country; and that some manipulation is involved.

J.A. 101 (Declaration of Leonard W. Doob, ¶ 3). Similarly, Edwin Newman, a leading author and lecturer on American English usage, has testified that "whatever its origin, propaganda has become a 'dirty word' The general understanding, I believe, is that when something is labeled propaganda, it should be looked at closely and with suspicion." J.A. 107-08 (Declaration of Edwin Newman ¶ 3).

¹⁸ See, e.g., B. & C. Evans, *A Dictionary of Contemporary American Usage* 397 (1957), which explains:

Though in origin and history and in its special Roman Catholic sense, *propaganda* has no unfavorable connotations, in popular usage today it is a derogatory term. It is used to describe the efforts of those whom we regard as enemies to make their creed or policy known and accepted. (*Communist propaganda. That's just a lot of propaganda*). Our own attempts to win acceptance for our creed and policy are termed a crusade, a campaign of enlightenment, or, more simply and more commonly, the truth.

See also W. & M. Morris, *Morris Dictionary of Word and Phrase Origins* 464 (1977) ("In today's battle of ideas and ideologies, what our side says is 'information,' what the opposition says is *propaganda*. . . . [I]ts use today is almost wholly in derogatory connotations"); *Webster's New World Dictionary* (2d ed. 1976) ("propaganda" defined to include "any systematic, widespread dissemination or promotion of particular ideas, doctrines, practices, etc. to further one's own cause or to damage an opposing one . . . ideas, doctrines or allegations so spread: now often used disparagingly to connote deception or distortion"); *Harper Dictionary of Contemporary Usage* (1975) ("Propaganda has become and will remain a semantically slanted word"); *Funk & Wagnalls Standard College Dictionary* (1973) ("Propaganda is now often used in a disparaging sense, as of a body of distortions and half-truths calculated to bias one's judgment or opinions"); *Little Oxford Dictionary of Current English* (1962) (propaganda defined as "means of) disseminating doctrine, information, etc. in order to promote or injure cause etc.; (esp. misleading) information etc. so disseminated"); *Oxford Illustrated Dictionary* (1962) (propaganda defined as "[a]ssociation, organized scheme, for propagation of a doctrine (freq. with implication of bias or falsity, esp. in politics)").

perceived foes as "propaganda," while shunning the term when describing the United States' own "information" efforts.¹⁹ And in numerous works on the subject this highly unfavorable usage is readily recognized.²⁰ In fact, the government has conceded the pejorative connotations of FARA's use of the term "political propaganda" in testimony before the House Subcommittee on Civil and

¹⁹ President Truman, in a speech to the American Society of Newspaper Editors, stated that "deceit, distortion and lies are systematically used by the Communists as a matter of deliberate policy. This propaganda can be overcome by truth—plain, simple, unvarnished truth—presented by newspapers, radio, and other sources that people trust." New York Times, Apr. 21, 1950, quoted in Martin, *International Propaganda: Its Legal and Diplomatic Control* 17 (1969). President Reagan, in his address to a joint session of Congress on April 27, 1983, stated: "Contrary to propaganda, the opponents of the Sandinistas are not die-hard supporters of the previous Somoza regime." N.Y. Times, Apr. 28, 1983, § A, at 12, col. 3, quoted at J.A. 108. President Carter, in his message to Congress transmitting the reorganization proposal for the United States Information Agency to create a new International Communication Agency, stated that "[t]he new agency must not operate in a covert, manipulative, or propagandistic way." Reorganization Plan No. 2 of 1977, 91 Stat. 1636, Message of the President, quoted in 22 U.S.C.A. § 1461 at 62 (1979).

²⁰ See, e.g., M. Yudof, *When Government Speaks* 168 ("Propaganda consists of the 'big lie,' of outrageous efforts to create a pseudo-reality"); J. Fulbright, *The Pentagon Propaganda Machine* 9 (1970) ("The word 'propaganda' in current usage implies some degree of subterfuge"); L. Doob, *Public Opinion and Propaganda* 231 (1966) ("An effective way in Anglo-Saxon society to insult, belittle, or expose a man is to call him a propagandist"); L. Fraser, *Propaganda* 12 (1957) ("In recent decades propaganda has been given a bad name" due to propaganda methods of Hitler and Goebbels); H. Lasswell, *Propaganda Technique in the World War* 2 (1938) (propaganda is "often an object of vituperation"); Powell, *Towards a Negotiable Definition of Propaganda for International Agreements Related to Direct Broadcast Satellites*, 45 L. & Contemp. Probs. 3 (1982) ("few terms are more derogatory than 'propaganda.'").

Constitutional Rights.²¹ It has recognized that "propaganda" is not a neutral concept in its proposals to amend FARA.²² Based upon this overwhelming and un rebutted evidence, the district court here correctly found that "the term 'propaganda' as used in ordinary speech, is a word of reproach." *Keene v. Meese*, 619 F. Supp. at 1121 (J.S. App. 19a).

The existence of alternative neutral definitions for a word such as "propaganda" cannot dispel its common and widely perceived pejorative connotation. The district court found that, while there exist dictionary meanings of "propaganda" that do not suggest a negative connotation, "these dictionary meanings have little if anything to do with the use of the word 'propaganda' in ordinary speech." *Id.* at 1122 (J.S. App. 20a). In *Block v. Meese*, the court of appeals stated that "propaganda" is "generally regarded as more likely than other speech to contain 'half-truths, distortions, and omissions,'" 793 F.2d at 1311 (quoting *Keene v. Smith*, 569 F. Supp. at 1520) (J.S. App. 59a), but sought to minimize the significance of this fact through a distinction between the more neutral and therefore supposedly "accurate" dictionary definitions, said to be in accord with that in FARA, and the "general distrust of the phenomenon accurately described." 793 F.2d at 1312 & n.3.

What the court of appeals in *Block* failed to appreciate, however, is that FARA regulates a far broader category of speech than the use of the term "propaganda" would suggest to the public. Even though these Canadian films take a position on political issues, it by no means follows that they are more likely to be false or mislead-

²¹ This testimony was included in the Joint Appendix in *Block v. Meese* at 217, and is attached hereto as Appendix B (Statement of Assistant Attorney General D. Lowell Jensen). Citations are to B-3, B-6.

²² J.A. 118 (Letter of Deputy Attorney General Edward C. Schmults to Hon. Robert W. Kastenmeier).

ing.²³ The statutory definition is broad enough to encompass any material that seeks to persuade its recipients, even though the persuasion be entirely truthful, logical and accurate. Yet, by classifying the films as "political propaganda," the government has effectively ensured a greater likelihood that the public will view them in a skeptical and negative light, and that their conclusions from the ideas presented will be skewed, or that they will not view the films at all.

The district court here understood that when the restriction on speech arises from the interplay of government action and public opinion, the public understanding of and reaction to a "propaganda" classification is crucial. The principle was clearly applied in *Lamont*, where the term "communist political propaganda" was neutrally defined in the statute; indeed, the latter two words were defined according to FARA itself. 381 U.S. at 302-03. Nevertheless, in holding the statute unconstitutional, the Court stressed the commonsense appreciation that "any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.'" *Id.* at 307.

The district court thus correctly concluded that the statutory definition of "political propaganda" in 22 U.S.C. § 611(j) is not controlling with respect to the constitutionality of FARA, and dismissed the government's statutory construction argument as "bootstraping." *Keene v. Meese*, 619 F. Supp. at 1122 (J.S. App. at 21a). A definition chosen by Congress is controlling as to the scope of a statute, but this Court has never held that Congress, by choosing a definition for an opera-

²³ Uncontroverted expert testimony in *Block* established that none of the films in issue reflects systematic manipulation, hidden motives, distortion or deceit. See *Block v. Meese*, Joint Appendix at 71 (Plaintiffs' Statement of Material Facts, ¶ 4) and affidavits cited therein. The government has never disputed this fact, either in *Block* or in this case.

tive statutory term, can preclude an independent determination of a statute's constitutionality based upon its actual effect. In fact, *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), recognizes that the absence of any illicit legislative intent is irrelevant in determining whether a statute abridges First Amendment rights. *Id.* at 592. Thus, the FARA definition is conclusive only as to whether the films in issue are subject to classification under the statute. The government has cited no authority, either here or before the district court, treating a statutory definition as conclusive in a constitutional challenge to the statute's effects.

Official classification of the Canadian films as "political propaganda" thus imposes a tangible burden on the exercise of protected speech, limiting the right of American citizens to receive information from abroad. There could hardly be any doubt that the First Amendment would be violated, were Congress to assign the Justice Department the task of reviewing the literature produced by American political parties with the object of determining and announcing its "propaganda" status. What Congress has done here is no less of an abridgement of First Amendment rights.

C. Classification of These Films as "Political Propaganda" Serves No Compelling Government Interest.

Where official action, as here, burdens First Amendment rights, the government must demonstrate a compelling purpose for the classification and a substantial relationship between the classification and that purpose. *Brown v. Socialist Workers*, 459 U.S. at 91-92; *First National Bank of Boston*, 435 U.S. at 786; *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976) (opinion of Brennan, J.); *Buckley v. Valeo*, 424 U.S. at 25. Without a close fit between means and ends, government action restricting speech must be found unconstitutional under the First

Amendment. *Secretary of State v. J.H. Munson Co.*, 467 U.S. 947, 961, 968 (1984); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980).

The only purpose the government advances for FARA's classification requirement is the disclosure of the source of materials disseminated by foreign agents. "FARA is a disclosure statute designed to enlighten the public as to the scope of political activities conducted by agents on behalf of foreign principals." J.A. 117 (Letter of Deputy Attorney General Edward C. Schmults to Hon. Robert W. Kastenmeier). Less restrictive means, however, are certainly available to meet the government's interest than declaring these films to be "propaganda." Far from showing why it is necessary to classify a film as "political propaganda" in order to inform the public that it is disseminated by a foreign agent, the government has expressly recognized that the "political propaganda" classification is unnecessary and has recommended that Congress remove it. In 1983, the Justice Department's representative testified before the House Subcommittee on Civil and Constitutional Rights that the statutory criteria are actually directed at "political advocacy,"²⁴ and the Justice Department subsequently informed the Chairman of the House Subcommittee on Courts, Civil Liberties and the Administration of Justice that it would not oppose deletion of the current reference to "political propaganda."²⁵ Specifically, the Justice Department recommended the replacement of "political propaganda" with a "more neutral term like political 'advocacy' or 'information' to denominate information that must be labelled."²⁶

²⁴ Appendix B at B-6 (Statement of Assistant Attorney General D. Lowell Jensen).

²⁵ J.A. 117 (Letter of Deputy Attorney General Edward C. Schmults to Hon. Robert W. Kastenmeier).

²⁶ J.A. 118 (*id.*).

The government's own recommendations make it obvious that the "political propaganda" classification is unnecessary as well as harmful. The broad definition in 22 U.S.C. § 611(j) actually sweeps in all forms of political advocacy on behalf of foreign governments, fair or foul, accurate or distorted, and brands them all as "propaganda," a pejorative term in common American English usage. While technically one thing is regulated, the public is led to believe that quite another is in issue, and freedom of expression suffers as a result. There is no need for our government to damn these films as political propaganda in order to reveal to the public that the government of Canada is responsible for their dissemination in the United States. The district court correctly recognized that the FARA classification was a "wholly gratuitous step." *Keene v. Meese*, 619 F. Supp. at 1125. It is an anachronism that burdens the right to receive political speech without advancing any compelling government interest.

CONCLUSION

For the above reasons, the "political propaganda" classification required by the Foreign Agents Registration Act violates the First Amendment on its face and as applied to the films in issue. The judgment of the district court should be affirmed.

Respectfully submitted,

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APPENDICES

A-1

APPENDIX A

DEPARTMENT OF JUSTICE

FOR IMMEDIATE RELEASE
FRIDAY, FEBRUARY 25, 1983

PAO
202-633-2007

Thomas P. DeCair, Director of Public Affairs, issued the following statement today:

The Department of Justice's action last month concerning three films to be distributed in the United States by the National Film Board of Canada was taken pursuant to the provisions of the Foreign Agents Registration Act and should not be construed as any form of censorship or intimidation.

The action taken by the Department is to ensure that the films are properly labeled to conform with a major focus of the Foreign Agents Registration Act which places an emphasis on the protection of the integrity of the decision-making process of our government and on the public's right to know the sources of foreign political propaganda.

The National Film Board of Canada, a cultural agency of the Canadian government, has been registered as a foreign agent under the Foreign Agents Registration Act since February 1947.

The film board, as any other foreign agent, knows that the U.S. government, pursuant to the provisions of the Foreign Agents Registration Act, requires the disclosure of the identity of persons engaging in propaganda activities for or on behalf of foreign governments, foreign political parties and other foreign principals.

The Department's review of five films proposed to be disseminated by the film board was done in a routine manner in compliance with the FARA regulations.

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The decisions that three of the five films were "political propaganda" as statutorily defined in the disclosure provisions of the Act, was made solely by career attorneys who are charged with the responsibility of enforcing the FARA statute.

In an exchange of at least eight letters between the Justice Department and the film board, at no time did the film board raise any complaint about the compliance with the filing and the labeling requirement of the Act.

The FARA unit, as a routine matter, reviews a minimum of 25 films a year. Some of these are submitted voluntarily by registrants; while others are requested by unit attorneys. Some 50 per cent of these films are found to be within the statutory disclosure requirement.

The film board, in its latest letter to the Department of February 17, 1983, said it intended to comply with the labeling requirements of the Act.

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APPENDIX B

DEPARTMENT OF JUSTICE

STATEMENT

OF

D. LOWELL JENSEN
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CIVIL AND
CONSTITUTIONAL RIGHTS
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

THE FOREIGN AGENTS REGISTRATION ACT
OF 1938, AS AMENDED

ON

MARCH 18, 1983

STATEMENT OF D. LOWELL JENSEN,
ASSISTANT ATTORNEY GENERAL,
CRIMINAL DIVISION

I am pleased to have an opportunity to testify before this subcommittee at the invitation of Chairman Edwards with respect to the Foreign Agents Registration Act and its recent application to the National Film Board of Canada (NFBC). I believe I can provide the most effective assistance to this subcommittee by discussing the administration and enforcement of the Act with particular emphasis on the labeling and reporting of political propaganda.

HISTORY AND PURPOSE OF THE
FOREIGN AGENTS REGISTRATION ACT (FARA)

In 1938, in response to the recommendations of the House Judiciary Committee, which had studied the rise of the propaganda activities of extremist regimes and had discovered an extensive underground propaganda apparatus established by the German government using American firms and citizens, the 75th Congress enacted the Foreign Agents Registration Act. The general purpose of the Act was to identify foreign agents engaged in the dissemination of propaganda, to require them to make a public record of the nature of their relationship, and to require them to label political advocacy of foreign origin so that hearers and viewers in the United States would realize the source of such materials. FARA thus represents the legislative judgment that secret foreign involvement in the domestic political process posed a threat to the effective functioning of the Congress and the executive branch. The purpose of FARA was not to prohibit propaganda, it was to make the sources of the propaganda known to the American public.

However, it is fair to say that the original act reflected a perceived close connection between political propaganda

and subversion. It is this original focus, I believe, and therefore the perjorative connotations of the phrases "foreign agent" and "political propaganda" which has caused such misunderstanding over the years. This is unfortunate, because as a review of the history of the Act demonstrates, FARA abandoned its original concentration on subversion (or terrorism) and its current focus is on foreign policy advocacy, with an emphasis on international economic matters. Its approach, in fact, is similar to current political campaign financing laws and the Federal Regulation of Lobbying Act.

The Foreign Agents Registration Act has been amended several times, the most significant for our purposes occurring in 1942, 1955, and 1966. The 1942 amendments set the Act in its present form of definition, coverage, requirements, exemption and penalties, and both redefined old terms and added the definitions of such new terms as "political propaganda" as were thought necessary to the effective functioning of the law. In addition to defining the term political propaganda, the 1942 amendments required the labeling of all such propaganda, disseminated in the United States by non-exempt agents through the mails, or by any means or instrumentality of interstate or foreign commerce, and the filing of copies of such propaganda with the government. Finally, the 1942 amendments transferred responsibility for administration of the Act from the State Department to the Justice Department, and added the present preamble to the Act.

In 1955, FARA was amended to repeal Section 20(a) of the Internal Security Act of 1950, and to substitute a *separate* registration statute for persons with assignments or training in the espionage, counter espionage or sabotage services or tactics of a foreign government. This enactment was significant in that it represented a further break with the original focus of the 1938 Act

on subversives, and a rededication to the 1942 focus on political advocacy.

A further shift occurred with the 1966 amendments to the FARA as the Senate Foreign Relations Committee concluded that increasing U.S. political and economic overseas commitments led to increasing efforts by foreign governments and political and commercial interests to influence the direction of such policies. While the traditional focus of such efforts was the Department of State, "the increasing direct congressional participation in specific foreign policy matters" made Congress "an additional target" of such efforts to influence. The belief was that the mass media and various segments of the electorate could be targeted by foreign agents in an attempt to put pressure on Congress.

Acting on these observations and conclusions, Congress made the following changes in FARA in 1966 pertinent to this discussion:

1. The new terms "political activities" and "political consultant" were added and defined and the terms "foreign principal" and "agent of a foreign principal" were redefined, to better focus FARA on individuals attempting to influence Government policies through political activities.

2. Foreign agents contacting Members or committees of Congress on policy matters were required to identify themselves as agents of a foreign principal, and those testifying before a congressional committee were required to file a copy of their latest registration statement as part of their testimony.

3. The requirement to label and file propaganda was narrowed to propaganda prepared or disseminated for or in the interest of the agent's foreign principal.

In summary, the 1966 amendments to FARA reaffirmed and narrowed its focus on disclosure of political

advocacy on behalf of foreign interests. Perhaps not coincidentally, the disclosure approach of FARA was also adopted in federal legislation dealing with federal elections and with domestic lobbyists. For example, Title 2 U.S.C. 441(d) requires that literature "specifically advocating the election or defeat of a clearly identified candidate" for federal office contain an attribution clause identifying the candidate or the political committee responsible for it. The purpose of all three enactments is the same, the danger that persons might otherwise be deceived that the information comes from a disinterested source. The approach of FARA is thus generally accepted.

While the focus of FARA has changed over the years, appreciation of that fact has not, which resulted in the inaccurate and unfortunate media coverage of the recent action of the Department concerning the films disseminated by the NFBC. It is my purpose today to correct some misapprehensions which emerged in this coverage. I believe that this recitation of the facts will put the current controversy into focus.

II. CURRENT ADMINISTRATION AND ENFORCEMENT OF FARA

The cornerstone of the enforcement of any disclosure statute like FARA is voluntary compliance. The NFBC has been registered with the Attorney General under the Act since 1947.

Every year, the NFBC, Ottawa, Canada, produces materials, including films, which are disseminated in the United States. It would be impossible for the Department to review all such materials for even this one registrant, let alone all 700 registrants, and we do not try. Instead, the NFBC itself lists all film titles being disseminated for the first time on its six-month reports. Its report for the period ending June 30, 1982 contained

a list of 62 new video tapes and 16mm films. From this list a career Department employee who has been assigned to the Registration Unit for approximately ten years, selected five films for review. This selection process necessarily involves some discretion and expertise, primarily a sensitivity to the leading political themes of the day. I might add that it involves a good deal more common sense, for review of any significant amount of these materials requires time, and therefore expense, for all concerned.

Review of the films is strictly limited to whether they meet the statutory criteria. The test is objective. The reviewer is not permitted to speculate about the motive or bias of the author; the standard is set forth in the definition. This test, in two words, is political advocacy. It is of no concern whether the advocacy is from friend or foe, or whether it promotes or attacks U.S. policy. The Act applies to foreign sponsored advocacy "whether friendly or unfriendly, whether violent or mild" *U.S. v. Kelly*, 51 F. Supp. 362, 363 (1943). The decision that these films constituted political advocacy, was made by a respected expert career civil servant whose judgement regarding the advocacy content of the materials has not been challenged by the NFBC and has been ratified by every official who has reviewed the films, including myself.

The current controversy, I believe, stems from the pejorative connotation of the phrases "political propaganda" and "foreign agents" in the public mind, and some misinformed speculation regarding the scope of the Act. I believe it would be helpful to keep the following three points in mind when discussing our recent action concerning the three NFBC films. First, the action did not involve censorship. Disclosure of sources, not prohibition, is the approach of FARA. Second, the label required to be placed on the films is neutral on its face, and makes no comment regarding the content of the film.

Contrary to media reports, the films do not contain the label "political propaganda," that phrase nowhere appears in the label. Third, FARA does not apply to films *per se*, nor does it apply to every person who receives, views or transmits the films *AD INFINITUM*. The labeling and filing requirements instead apply only to non-exempt agents who disseminate films within the statutory definition on behalf of a foreign principal. Let me expand upon these three points.

The consequence of a decision by a registrant or the Department that a film is within the statutory definition of "political propaganda" is not prohibition. *Foreign advocacy of domestic political or social issues is not prohibited under the Act*. Instead, upon concluding that material is political advocacy, the following neutral label is attached:

This material is prepared, edited, issued, or circulated by (name and address of registrant) which is registered with the Department of Justice, Washington, D.C., under the Foreign Agents Registration Act as an agent of (name and address of foreign principal). This material is filed with the Department of Justice where the required registration statement is available for public inspection. Registration does not indicate approval of the contents of the material by the United States Government.

Note again that this is *not* a warning, similar to that required on cigarette packages by 15 U.S.C. 1333, that the material is "political propaganda." Instead, FARA follows the "truth in packaging" approach of the Federal Election Campaign Act, and specifically Title 2 U.S.C. § 441d, which requires that literature "specifically advocating the election or defeat of a clearly identified candidate" for federal office contain an attribution clause identifying the candidate or political committee responsible for it. The FARA disclaimer is simply an attribution clause, nothing more.

Third, although the media reported that the names of persons who viewed the film must be given to the Department of Justice, this is just not true. In the case of films, radio or television scripts, the following information must be furnished by the agent: the name of the station, organization, or theater using the film, the dates that the film was shown, and the estimated number in the audience. This information is kept on record in Washington for public viewing. Note that non-agent recipients have no reporting obligations under the Act, and that under no possible reading of the attached dissemination report could the identities of individual viewers conceivably be required.

Attached to my prepared statement is a representative listing of 47 films and 8 "public service" television spots which have been labeled and reported in accordance with the FARA over the past few years. It is interesting to note that the listing covers a broad variety of subjects, issues and countries. Also attached is a listing of 15 recent civil enforcement actions filed by the Registration Unit and two civil actions defended by the Unit, lest the Congress inadvertently get the impression that reviewing films is the major focus of the Department's efforts in this area. To the extent that such records were maintained at the Department, they reflect that in the mid 1970's the Unit reviewed 94 films, and determined that 31 fell within the definition of "political propaganda" as set forth in the Act. Unfortunately, there are no comparable records for prior or current years.

In considering amendments to FARA based on any perceived "long range implications for regulation of the mass media", I would like to make three points. First, FARA specifically excludes from the definition of "agent of a foreign principal" any U.S. owned and controlled news or press service or association. Secondly, Congress specifically considered and rejected imposing requirements on the mass media to label materials originating with

foreign agents during the course of its 1963-1966 hearings. The excerpt of the full text of the conclusions of the Senate Foreign Relations Committee Report on this point is attached as addendum to this testimony. This further suggests that FARA holds no long range implications for regulation of the mass media. Finally, I would like to bring to the Committee's attention a 1980 G.A.O. letter report, also attached, on public use of the information filed under the Act. The Report, based on a representative sample of files, states that the most frequent reviewer of the files were the media. The material filed under the Act enters the public domain, but the public becomes aware of it primarily through news reports which seldom give their source, as is indeed their privilege.

I trust that these facts will bring the current dispute into focus. If the Congress wishes to pursue the question of possible amendments the Department stands ready to assist this committee or other interested parties in considering suggestions for improvement of the Act. This concludes my prepared statement. Thank you.

AMICUS CURIAE

BRIEF

No. 85-1180

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

Supreme Court, U.S.
FILED

SEP 18 1986

JOSEPH F. SPANIOL, JR.
CLERK

EDWIN MEESE III, ATTORNEY GENERAL OF THE
UNITED STATES, AND JOSEPH E. CLARKSON,
Appellants,

v.

BARRY KEENE,
Appellee.

**ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

**BRIEF AMICUS CURIAE OF
THE FREEDOM TO READ FOUNDATION**

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31/12/86

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No. 85-1180

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

EDWIN MEESE III, ATTORNEY GENERAL OF THE
UNITED STATES, AND JOSEPH E. CLARKSON,
Appellants,

v.

BARRY KEENE,
Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF AMICUS CURIAE OF
THE FREEDOM TO READ FOUNDATION

The Freedom to Read Foundation respectfully submits this brief *amicus curiae*. All parties to this cause, through their counsel, have consented to this filing. Written consents have been filed with the Clerk pursuant to Rule 36.

INTEREST OF AMICUS

The Freedom to Read Foundation (Foundation) was established in 1969 by the American Library Association (ALA), the oldest and largest library association in the world and the chief voice of the modern library movement in North America. A nonprofit organization, the ALA represents more than 43,000 librarians, library trustees, educators, and library institutions. The purposes of the

nonprofit Foundation are to promote and defend First Amendment rights; to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen; to support the right of librarians to include in their collections and make available to the public any work which they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens.

Librarians and public library trustees in the United States have long fought against efforts by elected officials and others to burden books and films in publicly funded libraries through the use of pejorative classifications and labels, such as "communist propaganda."¹ They have resisted these efforts in order to protect library collections from purges and budgetary restrictions which would make the nation's libraries mere repositories of prevailing political ideas. It hardly needs to be said that such libraries — if libraries they be — could not serve citizens in achieving an "uninhibited, robust, and wide-open" debate on public issues. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The central question of this case is whether the government may, in harmony with the First Amendment, classify and label a political work in a manner which significantly burdens those who would use the work in furtherance of their own political speech. The Foundation submits that the First Amendment requires a negative answer to this question unless the government can

¹For example, in 1952 the *Boston Post* demanded the suppression of "communist poison" in the Boston Public Library. Boston Mayor John B. Hynes called upon the library to label all "communist" books. Drawing on support from the American Library Association and others, the trustees of the library defeated resolutions against the presence of "communist propaganda material" in the library by a 2-3 vote. Kipp, *Report From Boston*, 77 LIBRARY JOURNAL 1843 (1952).

demonstrate the existence of a countervailing compelling interest.

Librarians and other members of the Foundation support appellee because the classification and labeling requirements of the Foreign Agents Registration Act of 1938 (FARA), ch. 327, 52 Stat. 632-633, 22 U.S.C. §§ 611-621, have an undeniably adverse impact on libraries but serve no compelling interest.² A "political propaganda" classification under FARA perforce deters a decision by a library to purchase the affected work.³ If the work is acquired, the "political propaganda" classification makes the work suspect in the public's eye.⁴ For librarians and library users, the evil of a "political propaganda" classification and labeling under FARA is the inevitable diminution of the political ideas that libraries should freely offer to invigorate the debate of public issues.

²*Amici* Washington Legal Foundation and Allied Educational Foundation call FARA an "obscure government statute." Br. of Amici at 7. Obscure or not, the negative impact of FARA on intellectual freedom in the United States has long been a concern of librarians. See Gellhorn, *Restraints on Book Reading*, in R. DOWNS, *THE FIRST FREEDOM* 20, 33-34 (1960).

³Just as the threat of sanctions, as opposed to their actual application, may inhibit a major metropolitan newspaper from exercising its First Amendment rights, see *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 588 (1983), so may the threat of budgetary sanctions deter a public librarian from "wasting" tax dollars on "propaganda." See *Block v. Meese*, 793 F.2d 1303, 1308-1309 (D.C. Cir. 1986).

⁴An official classification of an expressive work as "political propaganda" clearly clouds the public perception of the work and the possibility of its use in political speech. See J. App. 68-88.

SUMMARY OF ARGUMENT

I. Appellee has standing to challenge the constitutionality of acts taken under FARA to classify and label three environmental films as "political propaganda" because he has both pleaded and proven "specific future harm," *Laird v. Tatum*, 408 U.S. 1, 14 (1972), which is "distinct and palpable," *Allen v. Wright*, 468 U.S. 737, 751 (1984) (citations omitted). More particularly, appellee has pleaded and proven that he, an elected official and lawyer, will be stigmatized as a disseminator of political propaganda if he uses the three films in furtherance of his own political speech while they remain under a FARA cloud of suspicion. Moreover, the harm confronting him is directly traceable to the government's acts, see *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982), and can be prevented by judicial order, see *id.*

II. Appellee has demonstrated that the phrase "political propaganda" is pejorative. Any definition supplied by Congress is irrelevant to the issue of the public's understanding of the phrase or its impact on political expression. That impact is inevitably negative; it inhibits the dissemination and prejudices the reception of the affected work, especially when the disseminator or recipient of the message is an elected official or public employee. See *Lamont v. Postmaster General*, 381 U.S. 301 (1965). Although censorship under FARA may at times be barely visible, the impact on such important public institutions as libraries is grave. When works classified and labeled under FARA are purchased by libraries, those institutions risk public outcry and budgetary retaliation over resources "wasted" on "propaganda." Moreover, the message of the affected works is tainted by the amorphous suggestion that they contain lies and distortions. Because appellants have failed to demonstrate the existence of any "compelling" interest to justify the burden placed upon

political speech by "political propaganda" classifications under FARA, the order of the district court should be affirmed. See *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 540 (1980).

ARGUMENT

I.

APPELLEE HAS STANDING BECAUSE THE "POLITICAL PROPAGANDA" CLASSIFICATIONS IN THIS CASE CREATE A THREAT OF A DISTINCT AND PALPABLE INJURY WHICH A JUDICIAL ORDER CAN PREVENT.

Appellee challenges the government's classification and labeling of three films as "political propaganda."⁵ He has alleged and proven that these specific acts by the government threaten the exercise of his right to engage in political debate by using the films. This pleading and proof is plainly adequate under Article III. Appellants' contention that appellee must suffer an actual injury before he can petition the federal courts for redress is contrary to established principles of standing.

A. There is a Direct Threat of a Distinct and Palpable Injury in This Case, Not Merely the Existence of a Governmental Program or Some Possible Act That May Be Taken in the Future Under That Program.

To have standing under Article III, appellee must demonstrate that he has suffered an "injury." *E.g.*, *Valley Forge Christian College v. Americans United for Separation*

⁵The three films are *If You Love This Planet*, about the environmental effects of nuclear war, and *Acid From Heaven* and *Acid Rain: Requiem or Recovery*, both on the detrimental effects of acid rain. They were all produced by the National Film Board of Canada.

of *Church and State, Inc.*, 454 U.S. 464, 472 (1982). However, the injury need not be economic. *E.g.*, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 262-263 (1977). Nor need it be "actual"; a "threatened" injury is sufficient. *Valley Forge, supra*, 454 U.S. at 472.⁶

A threatened injury, or "specific future harm," *Laird v. Tatum*, 408 U.S. 1, 14 (1972), is recognized as sufficient under Article III to avoid the undesirable consequence that one must "wait to sue until he loses his job or until his reputation is defamed," *id.* at 16 (Douglas, J., dissenting). Accordingly, the federal courts have acknowledged, for example, that a future loss of contributions is sufficient for standing to challenge a disclosure law. *See Buckley v. Valeo*, 519 F.2d 821, 871 n.130 (D.C. Cir. 1975);⁷ *see also, e.g., American Booksellers Association v. Virginia*, 792 F.2d 1261 (4th Cir. 1986) (fear of future enforcement of statute sufficient for standing).

In this instance appellee not only pleads but proves a threatened injury. Appellee demonstrates that he, an elected state official and a lawyer, will be stigmatized as a disseminator of foreign political propaganda if, in furtherance of his own political speech, he uses the three films while they remain under the cloud of a pejorative classification by the government. He provides undisputed affidavits showing that a close association of an elected official with officially branded "political propaganda" of a

⁶Thus, the questions of standing and ripeness have a close affinity. *See Warth v. Seldin*, 422 U.S. 490, 499 & n.10 (1975); *see generally* 13A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.12 (2d ed. 1984).

⁷On appeal, this Court simply concluded that "some appellants" had standing. *Buckley v. Valeo*, 424 U.S. 1, 11-12 & n.11 (1976).

foreign government is in fact stigmatizing and threatens the official in reelection efforts. *See* J. App. 68-88.

The injury confronting appellee is also "distinct and palpable," *Allen v. Wright*, 468 U.S. 737, 751 (1984) (citations omitted), as well as "real and immediate," *City of Los Angeles v. Lyon*, 461 U.S. 95, 102 (1983). Specifically, the threat is one of being stigmatized by an association with officially branded "propaganda." Such a threat stemming from the government's act has long been recognized as sufficiently real and immediate to warrant judicial intervention. *See Lamont v. Postmaster General*, 381 U.S. 301 (1965). Indeed, the potential harm to one with a sensitive public position is so concrete and palpable that the deterrent effect is "almost certain." *Id.* at 307. Appropriately, appellants all but concede that appellee's injury is sufficient to support standing. Br. of Appellants at 14.

Appellants' reliance on the *Laird v. Tatum, supra*, 408 U.S. 1, is misplaced because *Laird* in fact supports appellee. *Laird* denied standing to persons who complained abstractly of the existence of an agency ostensibly authorized to engage in acts of surveillance. These persons feared that "the agency might in the future take some *other* and additional action detrimental to [them]." *Id.* at 11 (emphasis in original). In contrast, the facts alleged and proven here are immediate and concrete. Appellee complains of stigmatizing acts *fully accomplished* by the government and the *distinct* threat that the stigma will be straightforwardly transferred to him when he exercises his right of political speech under the First Amendment.

B. The Acts of the Government, Not Third Parties, Cause the Threat to Appellee.

To satisfy Article III a plaintiff must also show that the acts complained of are the source of the harm. *Valley Forge, supra*, 454 U.S. at 472. The injury confronting

appellee is not only "fairly traceable" to the government's stigmatizing acts, *id.*, but directly traceable. In the absence of the government's acts of labeling the three films, there would be no possibility of appellee's being associated with "political propaganda" in using the films in furtherance of his own speech.⁸

Appellants attempt to avoid the conclusion that the government is the cause of the harm here by arguing that the injury confronting appellee flows, not from the government's acts, but from the irrational reactions or subjective impressions of third parties. This argument is specious and was correctly dismissed by the Court of Appeals in *Block v. Meese, supra*, 793 F.2d at 1309:

Whether the public has been irrational in interpreting the "political propaganda" classification as a judgment that these films are biased or unAmerican seems to us no more relevant to the issue of standing in the present case than it was relevant to the issue of standing in *NAACP v. Alabama*, 357 U.S. 449, 463 (1958), whether the citizens of Alabama were irrational in their reaction to membership in the NAACP.

C. A Judicial Order in Favor of Appellee Can Eliminate the Threatened Injury.

The final standing requirement of Article III is that the alleged injury must be capable of remedy through the judicial process. *Valley Forge, supra*, 454 U.S. at 472. This

⁸In contrast, in *Allen v. Wright, supra*, 468 U.S. 737, the effect of certain tax exemptions, or their removal, on the extremely complex and multifaceted decisions of parents to send their children to private schools was clearly speculative. Moreover, this speculation was compounded by the many factors influencing the policies of private schools and by the issue of the number of parents who would act collectively in response to any removal of tax exemptions.

requirement is easily satisfied here. A decision against the pejorative classification and labeling of political works can prevent the threatened injury by restraining any effort to classify the three films as "political propaganda." *See J. App.* 110.

II.

BECAUSE THERE IS NO COMPELLING NEED FOR THE GOVERNMENT TO CLASSIFY POLITICAL WORKS AS "POLITICAL PROPAGANDA," CONGRESS MAY NOT EMPOWER THE DEPARTMENT OF JUSTICE TO MAKE SUCH CLASSIFICATIONS.

A. Congress' Use of the Phrase "Political Propaganda" in the Foreign Agents Registration Act Significantly Burdens Freedom of Speech.

1. The phrase "political propaganda" is commonly understood to be a pejorative term.

The phrase "political propaganda", is a pejorative term which taints the message of all materials so classified and labeled pursuant to FARA. The district court ruled "that the phrase 'political propaganda,' and particularly the word 'propaganda,' is 'a semantically slanted word.'" J.S. 19a (citation omitted). The court based its finding on the uncontradicted declarations of two distinguished experts on American usage and by reference to authoritative works on the subject. *Id.* 19a-20a.

Appellants assert, however, that the phrase "political propaganda" as used in FARA is content-neutral and carried no negative connotations. In making this claim, appellants rely on the statutory definition of "political propaganda." Appellants further contend that the "neutral use of the term 'propaganda' [in FARA] is consistent

with general usage and understanding.”⁹ Br. of Appellants at 20.

Appellants’ reliance on the statutory terms and their contention are simply at odds with the common understanding of the word “propaganda.”¹⁰ In his unchallenged declaration, Leonard W. Doob, Sterling Professor Emeritus of Psychology at Yale University, states that “the designation ‘political propaganda’ of a film or book by the government is pejorative, denigrating to the material, and stigmatizing to those disseminating it.” J. App. 101. A Gallup poll reveals that 49.1% of the public would be less inclined to vote for a candidate for public office who had arranged to show three films which the Justice Department had classified as “political propaganda.” J. App. 86. This evidence demonstrates that no matter how the term may be defined statutorily, people in fact react negatively to the word “propaganda.”

Appellants concede that there is a pejorative dictionary definition of “propaganda”;

The fact that the term is also sometimes used to carry a disparaging meaning, see, e.g., *Webster’s New World Dictionary* 1138 (2d ed. 1972) (definition no. 3: “now often used disparagingly to connote decep-

⁹Appellants’ contention is apparently made as a point of law, albeit a curious one. Having introduced no relevant evidence in the district court, J.S. 26a, appellants may not attempt a new factual argument before this Court. It is a well established principle under Rule 56 that a party on appeal cannot introduce new evidence or raise new issues. See 10 C. WRIGHT, A. MILLER & M. KANE, *FEDERAL PRACTICE AND PROCEDURE* § 2716 (2d ed. 1983) (citing many cases).

¹⁰The argument of the Washington Legal Foundation and the Allied Educational Foundation readily — and appropriately — concedes that the phrase “political propaganda” is pejorative. Br. of Amici, *passim*.

tion or distortion”), does not suggest that it must be or is always so used.

Br. of Appellants at 21 n.16. This definition belies appellants’ contention that “political propaganda” is generally understood as a neutral phrase. If “propaganda” is “now often” used pejoratively, appellants simply cannot justify the statutory definition as “consistent with general usage and understanding.” Furthermore, as appellants quote from *Block v. Meese supra*, “[U]ndoubtedly, one would not describe the ideological efforts of one’s own church or nation as ‘propagandizing,’ though they are such” Br. of Appellants at 31. And why wouldn’t one characterize these activities as propaganda? The answer is clear: regardless of any statutory definition of “political propaganda” or Congress’ intent in drafting FARA, “propaganda” is a “dirty word.”¹¹

That “propaganda” may have, as appellants argue, a non-pejorative meaning is beside the point here. What is at issue is the government’s characterization of materials otherwise protected under the First Amendment and the effect of that characterization on would-be disseminators and recipients of the message.

2. The government’s classification of political expression as “political propaganda” impermissibly taints the speaker’s message and both inhibits the dissemination of the affected materials and impairs access to them, thereby impoverishing such fundamental free speech institutions as libraries.

The freedom of speech guaranteed by the First Amendment encompasses not only the right to express one’s thoughts, but the right to receive ideas and information as well. *Virginia State Board of Pharmacy v. Virginia Citi-*

¹¹Declaration of Edwin Newman, J. App. 107.

zens Consumer Council, Inc., 425 U.S. 748, 756 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972); *Lamont, supra*, 381 U.S. 301. The designation of works as "political propaganda" both taints their dissemination and impairs access to them.

It is not enough for appellants to say that "political propaganda" classifications under FARA are constitutional because they do not involve a direct ban on the acquisition or exhibition of materials or condition their receipt or exhibition on the performance of some official act. Br. of Appellants at 18-19. Such blatant forms of censorship are not the only acts prohibited by the First Amendment. "It is characteristic of freedoms in general that they are vulnerable to gravely damaging yet barely visible encroachments." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963); see also *Lamont, supra*, 381 U.S. at 309 (Brennan, J., concurring) ("inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government").

The Court recognized in *Lamont* that any person "is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.'" *Lamont, supra*, 301 U.S. at 307. The Court also acknowledged that certain people may be more susceptible than others to this kind of intimidation: "Public officials, like school teachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason." *Id.* Certainly, elected public officials who, like appellee, want to use "political propaganda" as their own political speech are in the same precarious position as the Court's untenured school teacher. Indeed, the Gallup poll in the record demonstrates that there would be real damage to a candidate for reelection to public office who

has been linked with exhibitions of "political propaganda." J. App. 68-88.

The subtle constraints of FARA on elected officials and public employees result also in grave injury to their institutions. Premier among these are the nation's libraries. In many cases, libraries are governed by elected or politically appointed individuals who may not understand or know how to evaluate the significance of a "political propaganda" classification or label. Following the classification of the three films involved in this case, the ALA received numerous inquiries from its members regarding the meaning of the government's acts. The unfortunate effect of such misunderstanding by the public generally will be decisions by libraries to avoid controversy by rejecting works made suspect by official acts under FARA.¹² When such works are purchased, both librarians and library users may be confused by the FARA label. Library users who encounter the label may fear the consequences of circulating the labeled work. Although appellants assert in this case that FARA labels may be removed, neither librarians nor their legal counsel will find any guidance in the language of FARA itself.¹³

¹²The National Film Board of Canada has been a source of films for American libraries for more than 45 years. The board has produced thousands of original films, and has garnered more than 2,000 international awards, including Motion Picture Academy Awards and blue ribbons from the American Film Institute. The taint of FARA is most unfortunate when it touches such a significant source of library materials.

¹³In responding to an inquiry made by the ALA in 1983 in connection with the three films of this case, appellant Clarkson described the FARA label but in no manner stated or even suggested that libraries were free to remove FARA labels. Letter of Clarkson to ALA Executive Director Robert Wedgeworth dated 27 May 1983.

In addition to unconstitutionally inhibiting the dissemination and reception of political works otherwise fully protected by the First Amendment, the designation of a work as "political propaganda" impermissibly burdens speech by tainting its message. Appellants disingenuously suggest that FARA "political propaganda" classifications advance First Amendment goals by providing information to the public. In fact, the program established by FARA is at war with the "uninhibited, robust, and wide-open" debate of public issues that the First Amendment contemplates. *New York Times Co. v. Sullivan*, *supra*, 376 U.S. at 270. By employing the denigrating phrase "political propaganda," the government is not adding to the "marketplace of ideas." It provides, for example, no information on the source or indeed any element of the message. On the contrary, the government places a burden on the disseminators of the designated material by requiring them to take affirmative steps to dispel an elusive and amorphous notion that their speech contains distortions and lies. Rather than fostering the open exchange of ideas favored by the First Amendment, the classification system of FARA spins a shadowy web of official disapproval. Rather than fostering the fair competition of ideas, the classification system allows the government to place a handicap on those who happen to choose as their form of expression materials originally disseminated by a registered foreign agent.

Precisely to avoid these undesirable consequences, the ALA has for 35 years recommended that libraries refuse to attach prejudicial labels to library materials. The ALA policy states:

Labeling is an attempt to prejudice attitudes and as such, it is a censor's tool. Some find it easy and even proper, according to their ethics, to establish criteria for judging publications as objectionable. However,

injustice and ignorance rather than justice and enlightenment result from such practices, and the American Library Association opposes the establishment of such criteria.¹⁴

B. The Government's Significant Interference with Political Speech Under the Foreign Agents Registration Act Is Not Justified by Any Compelling Interest.

When, as here, the government significantly burdens a person's speech, and the speech is closely related to the process of self-government, the government must show a countervailing interest which is "compelling." *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 540 (1980); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam). Moreover, the burden is on the government to demonstrate, first, the existence of such an interest, *Bellotti*, *supra*, 435 U.S. at 786, and second, the absence of any "less drastic means" for achieving the purposes of FARA, *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *accord*, *Consolidated Edison Co.*, *supra*, 447 U.S. at 540.

The only interest cited by appellants is protection of "the national defense, internal security, and foreign relations of the United States." Br. of Appellants at 34. Although such an interest may very well be compelling in some cases, appellants connect this interest only to the disclosure purposes of FARA. Appellants utterly fail to show that the purposes of FARA are served in any manner by the "political propaganda" label. They provide no demonstration, for example, that attachment of the phrase "political propaganda" to films on acid rain en-

¹⁴The full texts of the ALA Statement on Labeling and the ALA Library Bill of Rights appear in the Appendix to this brief.

hances national security. Indeed, if appellants demonstrate anything, their argument supports appellee.

Appellants concede that the phrase "political propaganda" is not necessary to advise the public. Appellants declare not only that the words "political propaganda" need not appear in the advisory label attached to the expressive materials of foreign agents, but also that persons in the position of appellee are free to remove or conceal the FARA label, regardless of its contents. Br. of Appellants at 15. Moreover, in a letter sent to Representative Kastenmeier in 1983, the Department of Justice stated flatly that it would not oppose deletion of the FARA reference to "political propaganda." J. App. 117.¹⁵ Thus, the pejorative terms of classification are apparently superfluous to FARA and the achievement of its goals.

Appellants of course argue that Congress can use the phrase "political propaganda" even if it is demonstrably pejorative. They contend that the statutory definition excludes all other meanings. But the question of this case is not whether Congress can define statutory terms as it pleases. The issue is whether Congress can properly create a scheme of classification which uses the label "political propaganda" if that label does in fact denigrate the political expression to which it is applied by the Department of Justice. The statutory definition of FARA is irrelevant to the resolution of the issue. What is relevant is the First Amendment's prohibition against placing significant burdens on political speech. As was shown above, under the First Amendment appellants must demonstrate the existence of a compelling need for use of

¹⁵The Department of Justice also stated to Rep. Kastenmeier that the definition of materials subject to the disclosure requirements of FARA should be "more narrowly focused." J. App. 118.

the phrase, as well as the absence of less burdensome means.

C. The Order of the District Court Jeopardizes Neither the Proper Exercise of Congressional Power Nor Governmental Speech.

Appellants and two *amici*, the Washington Legal Foundation and the Allied Educational Foundation, assert that the district court's holding impairs the ability of Congress to devise statutes. Appellants also contend more generally that the district court's holding would, when stretched to its ultimate conclusion, prevent even the selection of textbooks because it bars the government from speaking except in the blandest of neutral statements. There is no merit in these views.

1. Nothing in the district court's order improperly restricts Congress in making laws or prevents public officials from engaging in public debate.

The order of the district court is unremarkable in its requirement that political speech be left unburdened by Congress in the absence of a compelling interest justifying the burden. Consequently, the district court's order does not interfere impermissibly with "the business of legislating." Br. of Appellants at 37.

The correctness of this conclusion is unwittingly demonstrated by the Washington Legal Foundation and the Allied Educational Foundation. In describing almost a dozen cases in which Congress has used supposedly denigrating terms in statutes, Br. of Amici at 12, the two organizations provide a laundry list of instances in which Congress is free to act without the application of "strict security" under the First Amendment. Congress has broad power, for example, to regulate bribery and other conduct in which speech constitutes the illegal act. In only one instance mentioned by the two *amici* has Con-

gress even approached the regulation of protected political speech, namely, in the Subversive Activities Control Act. But in upholding section 7 of this act, 50 U.S.C. § 786, the Court held that the registration requirements of section 7 were justified by a menace to the very existence of the government. *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 96-97 (1961). Cf. *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (section 6 of the act held to violate the 5th Amendment).

Contrary to the further suggestion of appellants, Br. of Appellants at 37-38 (quoting *Block v. Meese*, *supra*, 793 F.2d at 1313-1314), nothing in the district court's order prevents members of Congress, presidents or attorneys general from contesting political views set forth in any newspaper, book or film, or from identifying those persons or works expressing the views with which they disagree. Appellants confuse the issue of impermissibly burdening political speech with the separate issue of the government's "offering its wares."

2. Nothing in the district court's order even remotely implies that the selection of books by public institutions represents an impermissible act of disapproval.

In their final argument appellants contend that the district court's order would preclude governmental speech even in the form of book selection by public officials. Br. of Appellants at 37-38 (quoting *Block v. Meese*, *supra*). This contention, however, cannot withstand analysis.

No public school or public library in the United States purchases all the books, films, records, and other expressive works available in the marketplace. In every instance, the selecting official must exclude some works based on their subject matter. Such subject-matter exclusions are

necessary to conserve funds to purchase works which advance the purposes of the purchasing institutions. Thus, elementary schools do not typically spend money on advanced textbooks on nuclear physics. For similar reasons, many public libraries exclude esoteric treatises from their purchases. These subject-matter decisions are constitutionally proper, see *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 46 (1983); *City of Madison, Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 175 n.8 (1976); see also *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. —, —, 87 L. Ed.2d 567, 590 (1985) (Blackmun, J., dissenting); *Board of Education v. Pico*, 457 U.S. 853, 880 (1982) (Blackmun, J., concurring), and carry no negative implications with respect to the viewpoint of any excluded work.

Viewpoint-based decisions, however, are entirely different in their significance. It is only in the narrowly defined circumstance of inculcating fundamental democratic values in the education of the children that government may select works on the basis of viewpoints expressed in them. *Pico*, *supra*, 457 U.S. at 864. But in making such viewpoint-based decisions, public officials act in a "special role as educator," *id.* at 921 (O'Connor, J., dissenting), and are still constrained by the First Amendment rights of students, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). Furthermore, public officials may not make such decisions in the context of, for example, university and public libraries. *Pico*, *supra*, 457 U.S. at 914-915 (Rehnquist, J., dissenting).

Thus, even if one assumes that the selection of textbooks can imply disapproval of certain viewpoints, the order of the district court does not improperly limit school officials in the exercise of their special educational role. The order does, however, properly preclude the

denigration of political ideas when such denigration serves no compelling interest.

CONCLUSION

For the foregoing reasons, the Freedom to Read Foundation joins with appellee and respectfully submits that the decision of the district court should be affirmed.

Respectfully submitted,

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September 15, 1986

APPENDIX A

APPENDIX

STATEMENT ON LABELING

An Interpretation of the Library Bill of Rights

Labeling is the practice of describing or designating certain library materials by affixing a prejudicial label to them or segregating them by a prejudicial system. The American Library Association opposes this as a means of predisposing people's attitudes towards library materials for the following reasons:

1. Labeling is an attempt to prejudice attitudes and as such, it is a censor's tool.

2. Some find it easy and even proper, according to their ethics, to establish criteria for judging publications as objectionable. However, injustice and ignorance rather than justice and enlightenment result from such practices, and the American Library Association opposes the establishment of such criteria.

3. Libraries do not advocate the ideas found in their collections. The presence of books and other resources in a library does not indicate endorsement of their contents by the library.

The American Library Association opposes efforts which aim at closing any path to knowledge. This statement does not, however, exclude the adoption of organizational schemes designed as directional aids or to facilitate access to materials.

Adopted July 13, 1951. Amended June 25, 1971; July 1, 1981, by the ALA Council.

LIBRARY BILL OF RIGHTS

The American Library Association affirms that all libraries are forums for information and ideas, and that the following basic policies should guide their services.

1. Books and other library resources should be provided for the interest, information, and enlightenment of all people of the community the library serves. Materials should not be excluded because of the origin, background, or views of those contributing to their creation.

2. Libraries should provide materials and information presenting all points of view on current and historical issues. Materials should not be proscribed or removed because of partisan or doctrinal disapproval.

3. Libraries should challenge censorship in the fulfillment of their responsibility to provide information and enlightenment.

4. Libraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas.

5. A person's right to use a library should not be denied or abridged because of origin, age, background, or views.

6. Libraries which make exhibit spaces and meeting rooms available to the public they serve should make such facilities available on an equitable basis, regardless of the beliefs or affiliations of individuals or groups requesting their use.

Adopted June 18, 1948. Amended February 2, 1961, June 27, 1967, and January 23, 1980, by the ALA Council.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On September 15, 1986, I served the within Amicus Curiae Brief in re: "Edwin Meese III, vs. Barry Keene" in the United States Supreme Court, October Term 1986, No. 85-1180;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on September 15, 1986, at Los Angeles,
California


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